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Supreme Court, U.S.
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No. 01-1501

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2001

GRAY DAVIS, et al., *Petitioners,*

v.

JOHN ARMSTRONG, et al., *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1 (1979), the Court decided whether a state parole statute created a due-process right by looking to whether the statute's language was mandatory or discretionary. But later, in *Sandin v. Conner*, 515 U.S. 472 (1995), the Court disapproved that mechanical approach. It held that the proper focus was whether the state had created a right of "real substance"—something that an inmate would have a legitimate claim of entitlement to. Because *Sandin* did not explicitly overrule *Greenholtz*, circuits are split on the proper test for parole cases. Thus, the question presented is:

> Does this Court's test in *Sandin* apply to parole-suitability hearings for state inmates?

LIST OF PARTIES

Petitioners are Gray Davis, Governor of the State of California; Robert Presley, Secretary of the Youth and Adult Correctional Agency, the agency that oversees the California Board of Prison Terms; Carol Daly, Chair of the California Board of Prison Terms; and the California Board of Prison Terms.

Respondents are a class of current and future California state prisoners and parolees with mobility impairments, hearing disabilities, visual disabilities, learning disabilities, or mental retardation.

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IN THE SUPREME COURT OF THE UNITED STATES

No.

GRAY DAVIS, et al., *Petitioners,*

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JOHN ARMSTRONG, et al., *Respondents.*

OPINION BELOW

The court of appeals' opinion is reported at 275 F.3d 849 (9th Cir. 2001). App. 1a. The district court's findings of fact and conclusions of law, judgment, and permanent injunction are unreported. App. 60a, 151a, and 152a. The district court's revised injunction, entered after remand, is also unreported. App. 166a.

STATEMENT OF JURISDICTION

The Court of Appeals for the Ninth Circuit entered its judgment on November 28, 2001. App. 1a. A timely petition for rehearing was filed on December 12, 2001, and denied on January 9, 2002. App. 178a. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Penal Code section 3041

The text of this provision is provided in Appendix 180a.

STATEMENT OF THE CASE

Respondents are a class of disabled prisoners and parolees who contend that prison and parole policies violate due process, Title II of the Americans with Disabilities Act, and § 504 of the Rehabilitation Act. Specifically, they allege that the policies prevented them from understanding various parole proceedings, or denied them the opportunity to attend required hearings, or wrongfully denied them parole. The Board of Prison Terms conducts parole hearings and revocations.

The respondents alleged wide-ranging statutory and due-process violations regarding almost every aspect of the Board's parole operations. This petition, however, relates only to respondents' due-process rights at parole-consideration hearings for life prisoners. In that regard, the district court found that the Board's policies and procedures violated due process because class members received deficient notice of parole proceedings,

unknowingly waived important rights, and had been subject to unfair procedures. App. 144a-145a.

Petitioners appealed various aspects of the injunction to the Ninth Circuit, which affirmed in part, reversed in part, and remanded in part. In its published opinion, the court of appeals held, as a matter of first impression, that California prisoners have a federally protected liberty interest in parole hearings, because California's statute is sufficiently determinate to require the hearings as a matter of right. *Armstrong v. Davis*, 275 F.3d 849, 864-65 (9th Cir. 2001); App. 25a.

REASONS FOR GRANTING THE WRIT

Whether state prisoners and parolees have federal due-process rights in parole-consideration proceedings is an issue of continuing national importance with significant impact on every state's parole operations. Courts are split on the appropriate test for determining whether such rights exist.

The Seventh, Ninth, and District of Columbia Circuits continue to employ the analytical method that the Court in *Sandin* strongly criticized, and expressly disavowed in the prison context. *Armstrong v. Davis*, 275 F.3d 849 (9th Cir. 2001); *Heidelberg v. Ill. Prisoner Review Bd.*, 163 F.3d 1025 (7th Cir. 1998); *Ellis v. District of Columbia*, 84 F.3d 1413 (D.C. Cir. 1996). The Ninth and District of Columbia Circuits have also stated that, until the Court speaks directly to the issue in a parole context, the *Greenholtz* test will apply.

But the First, Third, and Eighth Circuits apply the *Sandin* test to parole and conditional-release cases. *Asquinth v. Dep't of Corrections*, 186 F.3d 407, 412 (3rd Cir. 1999); *Callendar v. Sioux City Residential Treatment Facility*, 88 F.3d 666 (8th Cir. 1996); *Hamm v. Latessa*, 72 F.3d 947 (1st Cir. 1995). As evidence of the confusion in the circuits, the Fifth Circuit uses a test employing elements of both *Sandin* and *Greenholtz*. *Orellana v. Kyle*, 65 F.3d 29 (5th Cir. 1995).

Unless the Court enunciates a rule, the circuits will continue to fracture and there will be no uniformity. This case presents a timely opportunity for the Court to provide much-needed direction to the circuits on a highly significant constitutional issue, and one which affects the extent of federal judicial intervention into state criminal-justice systems.

I.

HOW STATE-CREATED LIBERTY INTERESTS ARE DETERMINED IN PAROLE PROCEEDINGS AFFECTS CRIMINAL JUSTICE SYSTEMS NATIONALLY BUT HAS NOT BEEN DIRECTLY ADDRESSED BY THIS COURT SINCE IT REPUDIATED THE METHOD USED IN *GREENHOLTZ*.

A. The Court Has Directed Lower Federal Courts to Focus on the Nature of the Liberty Interest Rather Than the Language of the States' Statutes.

As a general rule, inmates have "no constitutional or inherent right . . . to be conditionally released before the expiration of a valid sentence." *Greenholtz*, 442 U.S. 1, 7 (1979). *Greenholtz*, whose underlying rationale has been overturned, found that states may, however, create a liberty a interest in parole. *Greenholtz*, 442 U.S. at 11-12. In deciding whether Nebraska created a liberty interest in parole, the *Greenholtz* Court looked to the language of the Nebraska statute to determine whether it created an "expectancy of release" that entitled the inmates to constitutional protection. *Id.* at 12.

This approach evolved from the Court's earlier decision in *Wolff v. McDonnell*, 418 U.S. 539 (1974). There, the Court held that a prisoner's interest in earning good-time credits was one of "real substance" because the credits affected the length of the inmate's term and, under the statute, the mandatory credits could be forfeited only for serious misbehavior. *Id.* at 477-78. *Wolff* focused not only on the statutes, but on the nature of the interest involved.

Four years after *Greenholtz*, the test further evolved when the Court held that states could create a liberty interest by "the repeated use of explicitly mandatory language in connection with requiring specific substantive predicates." *Hewitt v. Helms*, 459 U.S. 460, 472 (1983), *overruled in part by Sandin*, 515 U.S. 472. That is, the court focused not on the actual substance of the right, but on whether directory statutory language governed official decision-making and mandated the outcome to be reached upon a finding that the relevant criteria had been met. *Kentucky Dep't of Corr. v. Thompson*, 490 U.S. 454, 462 (1989).

The last time the Court addressed liberty interests in the parole context was *Board of Pardons v. Allen*, 482 U.S. 369 (1987). In *Allen*, the Court held that a Montana parole statute, which required the parole board to release a prisoner subject to certain restrictions, created a liberty interest because the statute's language created a presumption of parole. *Id.* at 377-78.

The analysis used in *Greenholtz*, *Hewitt*, and *Allen* remained the law until *Sandin* was decided. The Court in *Sandin* criticized the path that the liberty-interest analysis had taken, finding that it had strayed from its constitutional moorings. *Sandin*, 515 U.S. at 477-84. That departure was undesirable for two reasons. First, it created a disincentive for states to codify regulations and procedures to provide uniform treatment. *Id.* at 482. And second, it led to the involvement of federal courts in the day-to-day management of state prisons, an approach that the Court has disapproved on numerous occasions. *Id.* at 482-83.

The *Sandin* Court refocused the analysis on the nature of the interest deprived, and held that such constitutionally protected interests "will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due

Process Clause of its own force . . . nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.* at 484.

B. The Issue Is Unresolved and Has Continuing National Impact on an Integral State Function.

Although *Sandin* plainly abandoned the language-based analysis employed in *Greenholtz* and *Allen*, the Court did not overrule its holdings in those parole cases. Since *Sandin*, the Court has not directly addressed *Sandin*'s applicability in parole cases. Some circuit courts have interpreted the Court's actions as a complete abandonment of language-based rights analysis. Others have interpreted its actions as retaining language-based rights analysis in the special context of parole. Two of this Court's post-*Sandin* cases have touched on the issue but have not directly addressed the source of the circuits' confusion.

In the first case, *Young v. Harper*, 520 U.S. 143 (1997), the sole issue was whether Oklahoma's pre-parole program was more like parole or minimum-security incarceration, and, thus, whether continued participation was protected by the Fourteenth Amendment. The Court held that, because Oklahoma's pre-parole program was equivalent to parole, it was entitled to due-process protection. *Id.* at 152-53. In so holding, the Court focused on the nature of the deprivation and the pre-releasee's continuing interest in liberty as it had done earlier in *Morrissey v. Brewer*, 408 U.S. 471 (1972).

In the second post-*Sandin* case, *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998), the Court concluded that clemency proceedings did not implicate a liberty interest. In a plurality opinion, the Court found that there was no substantive expectation of clemency under Ohio's statutes and that, under *Sandin*, the availability of clemency and the state's procedures for it did not "impose 'atypical and significant

hardship on the inmate in relation to the ordinary incidents of prison life.'" *Woodard*, 523 U.S. at 282-83 (quoting *Sandin*, 515 U.S. at 484). Thus, whether *Sandin* applies in parole cases remains unsettled because neither *Young* nor *Woodard* has provided explicit guidance to the circuits on the direction they should take.

Yet the circuits need direction, not only because they are split, but because how due-process rights are determined affects the functioning of every state's parole system. The reasons for abandoning the pre-*Sandin* methodology in prison cases have equal weight in the parole setting.

First, parole can serve many beneficial purposes and states should not feel constrained in their ability to enact parole-related laws and regulations that are sufficiently directory to ensure uniform application, but are not intended to convey an expectation of liberty. The *Sandin* methodology accords the states due deference to run core state functions, such as their criminal justice systems, without fear that state laws will trigger federal due-process protections where none are owed or intended.

Second, would-be parolees are still prisoners and have not been granted even conditional liberty. That is, they are serving term-to-life sentences and receive periodic parole-consideration hearings. There is no reason that the due-process test for prisoners at parole-consideration hearings should be any different than the test applied to prisoners at disciplinary hearings, or a host of other prison-related proceedings. Under the approach used by the Seventh, Ninth, and District of Columbia Circuits, the same prisoner facing a disciplinary proceeding one day and a parole-consideration hearing the next, would have two different due-process analyses applied to his proceedings. By focusing on the interest at stake, rather than the

state statutes or the type of proceeding, the *Sandin* approach leads to a uniform application of federal due-process principles.

And finally, this Court has repeatedly disapproved federal courts' micro-management of states' criminal-justice systems, most recently in *Garner v. Jones*, where the Court observed that "[t]he States must have due flexibility in formulating parole procedures and addressing problems associated with confinement and release." *Garner v. Jones*, 529 U.S. 244, 252 (2000); *see also California Dep't of Corrections v. Morales*, 514 U.S. 499, 508 (1995) (disapproving approach that urged federal micro-management of state adjustments to parole and sentencing procedures); *Harris v. Alabama*, 513 U.S. 504, 512 (1995) (micro-management tasks properly rest within state's discretion to administer its criminal-justice system). By turning the focus away from language-based analysis and resetting the courts' sights on the liberty interest at stake, the *Sandin* approach respects federalism and allows states to manage their prison and parole systems without excessive and unnecessary federal oversight while still protecting federal due process.

The circuits' splintering decisions show that *Sandin*'s rational approach to liberty issues has not had the same beneficial effects in the area of parole as it has in the area of prison administration. Few things are more integral to the orderly functioning of a state's government than the administration of its criminal justice system. Whether *Greenholtz* or *Sandin* applies to parole issues is a significant issue deserving the Court's attention because it affects a core state function, it involves issues of federalism, and it will provide for uniform application of due process. This petition should be granted to resolve this important, but unsettled, constitutional issue.

II.

THE COURT SHOULD RESOLVE THE CLEAR SPLIT IN THE CIRCUITS OVER WHETHER THE *SANDIN* OR *GREENHOLTZ* TEST APPLIES TO DETERMINE THE EXISTENCE OF STATE-CREATED LIBERTY INTERESTS IN STATE PAROLE PROCEEDINGS.

The circuits have fractured in their approach to state-created liberty interests. Of the seven circuits that have addressed the issue post-*Sandin*, three have followed *Sandin*, three have clung to *Greenholtz*, and one has straddled the divide by applying a combination of the two tests. The need for uniformity in this important area is great, and, given the depth of the fissure, not likely to be resolved by the circuits.

The First Circuit confronted the issue in a parole case decided shortly after *Sandin*. *Hamm v. Latessa*, 72 F.3d 947 (1st Cir. 1995). In reversing the district court's reliance upon *Greenholtz*, *Hewitt*, and *Allen*, the court of appeals stated that, "the tectonic plates have shifted," that is, that *Sandin* worked a fundamental change in the analytical framework for liberty interests. *Id.* at 954. The court therefore applied *Sandin* to the case before it. *Id.* In doing so, the *Hamm* court recognized that "parsing the state law to determine its substance is not within the primary domain of a federal habeas court." *Id.* The First Circuit also later applied *Sandin* to a conditional-release case. *Dominique v. Weld*, 73 F.3d 1156 (1st Cir. 1996). The *Dominique* Court held that returning an inmate to confinement from a work-release program was not a significant or atypical deprivation and thus did not implicate due-process rights. *Id.* at 1160.

The two other circuits following the *Sandin* methodology, the Third and the Eighth Circuits, have done so in conditional-release cases. The Eighth Circuit held that returning an inmate to prison from Iowa's work-release program did not violate his due-process rights because it was not an atypical deprivation. *Callendar v. Sioux City Residential Treatment Facility*, 88 F.3d 666, 669 (8th Cir. 1996), (citing *Dominique*, 73 F.3d 1156 (1st Cir. 1996)). Likewise, the Third Circuit found that removing an inmate from New Jersey's community-release program and returning him to prison did not violate his rights because having to serve time in prison, as opposed to a half-way house, was what an inmate should expect from his prison sentence. *Asquinth v. Dep't of Corrections*, 186 F.3d 407, 412 (3rd Cir. 1999). *Asquinth* distinguished the Court's holding in *Young v. Harper* because, unlike the Oklahoma program in *Young*, New Jersey's inmates never left "institutional confinement." *Asquinth*, 186 F.3d at 411.

At the other end of the spectrum, the three circuits that have adhered to the mandatory-language analysis from *Greenholtz*, *Allen*, and *Hewitt* all seem to rest their reliance on a footnote in *Sandin* that stated that the new liberty test did not "technically require us to overrule any holdings of this Court." *Sandin*, 515 U.S. at 484 n.5. The only circuit of the three to devote any analysis to the matter was the District of Columbia Circuit, in *Ellis v. District of Columbia*, 84 F.3d 1413, 1418 (D.C. Cir. 1996). There, a group of prisoners sued over parole-eligibility and parole-revocation procedures. The court found that the *Sandin* test relates only to claims involving the day-to-day management of prisons and is ill-fitted to parole-eligibility determinations. *Id.* The court recognized that, while *Sandin* abandoned the reasoning of *Greenholtz* and *Allen*, it did not technically overrule them, and the *Ellis* court felt compelled to follow the old method: "Until the Court instructs us otherwise, we must follow *Greenholtz* and *Allen* because, unlike *Sandin*, they are directly on point." *Id.*

The Seventh Circuit felt equally bound by *Greenholtz* in a post-*Sandin* case brought by prisoners who were denied parole. *Heidelberg v. Ill. Prisoner Rev. Bd.*, 163 F.3d 1025 (7th Cir. 1998). The *Heidelberg* court found that although *Sandin* "criticize[d] the mandatory-discretionary dichotomy used in *Greenholtz* and *Allen*, it explicitly declined to overrule any previous case." *Id.* at 1026 n.1. Likewise, in this case, the Ninth Circuit relied on *Ellis* and declined to follow *Sandin* until the Court speaks more directly to the issue. *Armstrong v. Davis*, 275 F.3d 849, 864 (9th Cir. 2001).

That brings us to the Fifth Circuit, which has fashioned an amalgam of the two tests. Shortly after *Sandin*, the Fifth Circuit decided *Orellana v. Kyle*, 65 F.3d 29 (5th Cir. 1995), which challenged Texas's allegedly unconstitutional parole-review and reconsideration procedures. The court first discussed *Sandin* but then went on to explain that there was no due-process violation because the Texas statutes had previously been held to confer no liberty interest under the *Greenholtz-Allen* analysis. *Id.* at 32 (citing *Creel v. Keene*, 928 F.2d 707, 712 (5th Cir. 1991) (using *Greenholtz-Allen* analysis)). Similarly, in *Thompson v. Cockrell*, the court held that the Due Process Clause conferred no liberty interest in "calendar time" credits after an erroneous release on parole, but that Texas statutes did. *Thompson v. Cockrell*, 263 F.3d 423, 426-27 (5th Cir. 2001).

Illustrative of state courts' confusion is *In re Rosenkrantz*, in which a California appellate court found a protected liberty interest in parole proceedings by using the *Greenholtz-Allen* mandatory-language analysis, yet also cited *Sandin* as supporting its holding. *In re Rosenkrantz*, 116 Cal. Rptr. 2d 69, 80 (2002), *pet. review filed* Feb. 27, 2002.

The circuits are in disarray on their approaches to examining state-created liberty interests. Two of the circuits, including the one from which we petition, have explicitly said

they cannot follow *Sandin* without guidance from the Court. Guidance from the Court also would assist lawmakers of the states in understanding the appropriate principles that inform the laws and regulations of the criminal-justice systems. This is an issue of great significance on which the states need guidance.

CONCLUSION

Because this petition presents an issue of national importance, core to the functioning of the states' penal systems, on which the circuits are rent and to which this Court has not directly spoken, the petition for writ of certiorari should be granted.

Dated: April 3, 2002

Respectfully submitted,

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FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN ARMSTRONG, JAMES AMAURIC; RICHARD PONCIANO; JACK SWENSEN; BILLY BECK; JUDY FENDT; WALTER FRATUS; GREGORY SANDOVAL; DARLENE MADISON; PETER A. RICHARDSON; STEVEN HILL; DAVID ROSE; DAVID BLESSING; ELIO CASTRO; ELMER UMBENHOWER; RAYMOND HAYES; GENE HORROCKS; KIAH MINCEY; CLIFTON FEATHERS; WILLIE JOHNSON; DAVID BADILLO; JAMES SIMMONS; FLORA ABRAMS; JOEY GOUGH; TIMOTHY WHISMAN,

Plaintiffs-Appellees,

v.

GRAY DAVIS, Governor of the State of California; ROBERT PRESLEY, Secretary of the Youth and Adult Correctional Agency; JAMES NIELSEN, Chairman of the Board of Prison Terms; CALIFORNIA BOARD OF PRISON TERMS, DOES 1-100, In Their Individual and Official Capacity,

Defendants-Appellants.

No. 00-15132

D.C. No.
CV-94-02307-CW

OPINION

Appeal from the United States District Court
for the Northern District of California
Claudia Wilken, District Judge, Presiding

Argued and Submitted
April 12, 2001–San Francisco, California

Filed November 28, 2001

Before: Stephen Reinhardt, A. Wallace Tashima, and
Marsha S. Berzon, Circuit Judges.

Opinion by Judge Reinhardt;
Concurrence by Judge Berzon.

SUMMARY

Individual Rights/Disabilities

The court of appeals affirmed a judgment of the district court in part, reversed in part, and remanded. The court held that disabled prisoners and parolees establish "actual injury" sufficient to assert claims on behalf of a class by showing that they were subjected to discriminatory treatment by the California Board of Prison Terms on account of their disabilities in violation of both the Americans with Disabilities Act (ADA) and the Rehabilitation Act.

Appellees were a class of prisoners and parolees suffering from six categories of disability, including mobility impairments, hearing disabilities, visual disabilities, learning disabilities, mental retardation, and renal impairments. The disabled prisoners and parolees sued appellants, including state officials and the California Board of Prison Terms (collectively, the Board), alleging that California's parole and parole revocation hearing policies and practices discriminated against them on the basis of disability by failing to provide them with adequate accommodations in violation of the ADA and the Rehabilitation Act. The district court found that the Board failed to make proper accommodations for the disabled prisoners and parolees, with the result that a number of such individuals forfeited their rights to parole and parole revocation hearings and appeals, while others were unable to represent themselves adequately at such proceedings, all in contravention of federal law. Following a 10-day bench trial, the district court determined that the Board's written policy did not comply with the requirements of the ADA and that the Board engaged in systematic and widespread discrimination which violated the

ADA and the Rehabilitation Act. The district court entered a system-wide injunction requiring the Board to modify its policies and practices to comply with federal statutory and constitutional standards.

The Board appealed, challenging the disabled prisoners and parolees' standing, class certification, and the propriety and scope of injunctive relief. The Board did not challenge the district court's decision on the merits.

[1] In order to assert claims on behalf of a class, a named plaintiff must have personally sustained or be in immediate danger of sustaining some direct injury as a result of the challenged statute or official conduct. The harm suffered by a plaintiff must constitute actual injury. When a plaintiff seeks prospective injunctive relief, he must demonstrate that he is realistically threatened by a repetition of the violation. **[2]** When a court, through its specific factual findings, documents the threat of future harm to the plaintiff class and establishes that the named plaintiffs are personally subject to that harm, the possibility of recurring injury ceases to be speculative, and standing is appropriate. The district court made such findings and the Board did not challenge those findings on appeal.

[3] The Board's written policy did not comply with the requirements of the ADA. The disabled prisoners and parolees were injured by the Board's failure to comply with the ADA's requirements. They suffered discrimination on account of disability as a consequence, including the impairment or loss of services or programs provided by the Board. The Board's failure to comply also made likely the recurrence of such injuries in the immediate future.

[4] In conjunction with the Board's written policy, its practice throughout the parole and parole revocation process routinely deprived disabled prisoners and parolees of their rights under the ADA. As in the case of its written policy, the Board's practices warranted the holding that the realistic repetition

requirement had been met, and that the named plaintiffs had established standing.

[5] The named disabled prisoners and parolees were injured by the Board's policies and practices relating to its parole and parole revocation proceedings: they were subjected to discriminatory treatment on account of their disabilities in violation of both the ADA and the Rehabilitation Act. This treatment was sufficient to constitute an actual injury.

[6] Under Federal Rule of Civil Procedure 23(a), one or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defense of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

[7] In a civil rights suit, commonality is satisfied when the lawsuit challenges a system-wide practice or policy that affects all of the putative class members. In such circumstance, individual factual differences among the individual litigants or groups of litigants will not preclude a finding of commonality. The differences that existed as to the particular disabilities of the disabled prisoners and parolees did not justify requiring groups of persons with different disabilities, all of whom suffered similar harm from the Board's failure to accommodate their disabilities, to prosecute separate actions. The commonality requirement was met.

[8] When the challenged conduct is a policy or practice that affects all class members, the underlying issue presented with respect to typicality is similar to that presented with respect to commonality. In such a case, the typicality inquiry involves comparing the injury asserted in the claims raised by the named plaintiffs with those of the rest of the class. The injuries to the disabled prisoners and parolees were identical. They all

suffered a refusal or failure to afford them accommodations as required by statute, and are objects of discriminatory treatment on account of their disabilities.

[9] The scope of injunctive relief is dictated by the extent of the violation established. The key question is whether the inadequacy complained of is in fact widespread enough to justify system wide relief. System-wide relief is required if the injury is the result of violations of a statute or the constitution that are attributable to policies or practice pervading the whole system, or if the unlawful policies or practices affect such a broad range of plaintiffs that an overhaul of the system is the only feasible manner in which to address the class's injury. **[10]** System-wide injunctive relief was justified by the district court's findings of fact setting forth the injuries suffered by the disabled prisoners and parolees.

[11] In determining the scope of injunctive relief that interferes with the affairs of a state agency, it must be ensured that the injunction is not overly intrusive and unworkable and would not require for its enforcement the continuous supervision by the federal court over the conduct of state officers. These concerns have been codified in the Prison Litigation Reform Act (PLRA). **[12]** The district court specifically made the findings required by the PLRA, and narrowly tailored the injunction to remedy only those violations of the ADA and Rehabilitation Act established in the district court's findings of fact. **[13]** The relief granted was appropriate and the court order complied with the PLRA.

Judge Berzon concurred, writing that the injunction suffered none of the standing or other defects that would preclude equitable relief.

COUNSEL:

James M. Humes, California Attorney General, San Francisco, California, for the defendants-appellants.

Donald H. Specter, San Quentin, California; Arlene B. Mayerson, Berkeley, California; Michael W. Bien, San Francisco, California; Elaine B. Feingold, Berkeley, California; Eve Shapiro, San Francisco, California; Warren E. George, San Francisco, California; Shawn Everett Hanson, San Francisco, California; for the plaintiffs-appellees.

OPINION:

REINHARDT, Circuit Judge:

The facts established at trial, and not disputed on appeal, demonstrate that the State of California regularly discriminated against disabled prisoners and parolees during its parole and parole revocation hearing processes. The district court found that the California Board of Prison Terms (the state parole authority) failed to make proper accommodations for numerous disabled prisoners and parolees, with the result that a number of such individuals forfeited their rights to parole and parole revocation hearings and appeals, while others were unable to represent themselves adequately at such proceedings, all in contravention of federal law. Following a ten-day bench trial, the district court held that the defendants engaged in systematic and widespread discrimination which violated the Americans with Disabilities Act and the Rehabilitation Act, holdings that the state officials and agency do not now challenge on the merits. The district court entered a system-wide injunction requiring the Board to modify its policies and practices to comply with federal statutory and constitutional standards.

On appeal, the Board asks us to dissolve the district court's injunction principally for the following reasons: (1) the plaintiffs lack standing to challenge its policy; (2) the district court must defer to the Board's decisions as long as they potentially further any penological interest; (3) the plaintiffs' settlement agreement with the Department of Corrections prohibits injunctive relief for any acts the Board delegates to the Department; (4) the plaintiff class was improperly certified and is not entitled to system-wide relief; (5) and the Prison Litigation Reform Act and federalism concerns preclude the type of injunctive relief ordered. In addition, the Board argues that plaintiffs have no due process right to a parole hearing. We have jurisdiction to hear this interlocutory appeal under 28 U.S.C. § 1292.

I. BACKGROUND

The instant action was brought by a class of prisoners and parolees suffering from six categories of disability: mobility impairments; hearing disabilities; visual disabilities; learning disabilities; mental retardation; and renal impairments. Initially, the plaintiff class sued two divisions of the California Youth and Adult Corrections Authority (Agency or YACA): the Board of Prison Terms (Board or BPT) and the California Department of Corrections (Department or CDC). The divisions have different areas of responsibility regarding prisoners and parolees. The plaintiffs alleged that the state's policies and practices as implemented by both divisions discriminated against them on the basis of disability in violation of the Americans with Disabilities Act (ADA) and section 504 of the Rehabilitation Act, as well as violated the due-process clause of the Fourteenth Amendment.

By agreement of the parties, litigation against the two divisions was bifurcated and proceeded on two separate tracks. This appeal involves only the order and injunction directed to the Board of Prison Terms and certain state officials responsible for its operations, and not the separate order and injunction

addressed to the Department of Corrections. Neither the Board nor the state officials challenge the district court's conclusions that they engaged in system-wide violations of the ADA and Rehabilitation Act.

A. Parties

The named plaintiffs are prisoners sentenced under California Penal Code § 1168 to life with the possibility of parole who complain that the Board failed to provide them with adequate accommodations at a variety of parole hearings, and parolees who complain about the lack of accommodations during the parole revocation process.[1]

The defendants in the part of the case now on appeal are Gray Davis, the Governor of the State of California; Robert Presley, Secretary of the Youth and Adult Correctional Agency; James Nielsen, Secretary of the Board of Prison Terms; and the Board itself. The Agency oversees the activities of its various boards and departments, including the Board of Prison Terms.[2]

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1. The life prisoners are: Elio Castro, who is mentally retarded and partially deaf; James Simmons, who is developmentally disabled; Raymond Hayes and Gene Horrocks, both of whom are mobility impaired; and Clifton Feathers and Willie Johnson, both of whom are visually impaired. The parolees whose paroles were revoked are: Joey Gough, Flora Abrams, Timothy Whisman, and David Badillo, all of whom are developmentally or learning disabled; David Rose and David Blessing, who are hearing impaired; Elmer Umbenhower, who is mobility impaired; and Kiah Mincey, who is visually impaired. Four of the parolees (Gough, Rose, Blessing, and Umbenhower) were incarcerated at the time of the bench trial before the district court. It is unclear from the Third Amended Complaint whether the remaining class representatives, John Armstrong, Judy Fendt, Walter Fratus, and Gregory Sandoval, challenge conditions at hearings offered to life prisoners or parolees.

2. "The Youth and Adult Correctional Agency consists of the Department of Corrections, the Department of the Youth Authority, the Board of Prison Terms, the Youthful Offender Parole Board, the Board of Corrections, and the Narcotic Addict Evaluation Authority." Cal. Gov't Code § 12811.

As the Secretary of the Agency, defendant Robert Presley is directly responsible to the Governor, for the operations of each department within the Agency. The Secretary is a member of the Governor's Cabinet, and advises the Governor on correctional matters and on any changes necessary to properly conduct the work of the Agency.

As noted, plaintiffs initially sued two of YACA's divisions in this lawsuit: the California Department of Corrections and the Board of Prison Terms. The Department, which is not a party to the portion of the action on appeal, is responsible for all relevant aspects of prisoners' and parolees' lives, except that it does not have authority over parole and parole revocation hearings.[3] That authority is vested in the Board, which is one of the parties to this appeal.

The Board serves as the parole authority for the State of California, *see* Cal. Penal Code § 3000(b)(7). It conducts parole hearings for prisoners sentenced to a term of life with the possibility of parole, who are the only adult prisoners subject to such hearings under California law.[4] *See* Cal. Penal Code § § 1168, 1170. In addition, the Board conducts revocation hearings for parolees accused of violating conditions of parole, Cal. Penal Code § 2645, and revocation extension hearings for prisoners who allegedly commit an offense while incarcerated because they have had their parole revoked.[5] Finally, the Board

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3. The Department monitors the prisoners' behavior while on parole: it does so through the Parole and Community Services Division. See Cal. Penal Code § § 2400-2402, 5001-5003, 5054. *See also Terhune v. Superior Court*, 76 Cal. Rptr. 2d 841, 847 (Cal. 1988) (in bank) (parolee "under the legal custody of the Department").

4. Prisoners sentenced to lesser terms, under California's Determinate Sentencing Law, see Cal. Penal Code § 1170, are released on parole dates that are computed by the prison authorities pursuant to established rules.

5. All paroled prisoners are subject to supervision by state authorities, as well as to the possible revocation of their parole. Appeals

also conducts various custody hearings for offenders who are designated mentally disordered or sexually violent. It is the Board's discriminatory policies concerning against the disabled that form the basis for this appeal.

B. Procedural History

1. Pre-Trial Proceedings

Pursuant to a "settlement agreement" entered into in its part of the instant case, the Department (which is not involved in the present appeal) filed a motion regarding the applicability of the ADA and Rehabilitation Act as applied to prisons. The agreement provided that if the district court held the Acts applicable, the Department would be found liable.[6] The stipulation explicitly stated, however, that it did "not resolve any issues between plaintiffs and the Board of Prison Terms or defendant Nielsen." The district court denied the Department's motion for summary judgment, held that the two statutes are applicable to prisons, entered a remedial order and permanent injunction, and certified the issue of the applicability of the Acts to the Department for interlocutory appeal. We affirmed the district court's holding on that issue.[7]

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from parole revocation and parole revocation extension hearings are also conducted by the Board.

6. The settlement agreement provided that, "if the Court determines that the ADA and § 504 apply to the California Department of Corrections," the court would enter an injunction "to require defendants to operate programs, activities, services and facilities of the California Department of Corrections in accordance with the Americans with Disabilities Act and § 504 of the Rehabilitation Act of 1973."

7. This court has already decided two appeals on the Department's side of this litigation. *See Armstrong v. Wilson*, 124 F.3d 1019 (9th Cir. 1997) (appeal from the denial of summary judgment); *Armstrong v. Davis*, 215 F.3d 1332, (9th Cir. 2000) (table) (appeal from injunctive relief). The appeal before us is the first on the Board's side.

Plaintiffs continued to litigate their action against the Board. On January 5, 1998, the district court entered the parties' stipulation and order amending the class by including developmentally disabled prisoners so that the class" consists of all present and future California state prisoners and parolees with mobility, sight, hearing, learning, developmental and kidney disabilities that substantially limit one or more of their major life activities." Plaintiffs filed a second amended complaint reflecting the amended class designation, and named the defendants listed in the caption of this appeal, as well as a number of other individuals who were associated with the Department.

The Board moved to dismiss or strike all defendants other than Nielsen and the Board from the Second Amended Complaint, arguing that the "settlement agreement "had resolved the plaintiffs' claims against them.[8/] The court denied the Board's motions (other than as to the Director of the Department and his subordinates), on the ground that the Second Amended Complaint did not involve claims addressed in the settlement agreement, and that it did not constitute an attempt to retry the merits of those claims, nor to enforce the agreement collaterally. Thus, the court allowed the case against Governor Davis and Secretary Presley to proceed with respect to the matters now before us. Finally, at pre-trial conference, plaintiffs moved to amend their complaint by adding three more named plaintiffs. Defendants did not object, and the third amended complaint was filed on April 7, 1999.

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8. The Board also moved to dismiss the second amended complaint for failure to exhaust alternative judicial remedies as required by *Heck v. Humphrey*, 512 U.S. 477 (1994), and because the Board is not a "person" within the scope of § 1983. Plaintiffs withdrew their § 1983 action against the Board, but continued to sue Nielsen in his official capacity. The court held that the plaintiffs could sue Nielsen under § 1983 and, because they were not challenging the length of their confinement, were not required to exhaust alternative judicial remedies.

2. Trial

The parties engaged in a ten-day bench trial before the district court.[9] Based on the testimony of multiple witnesses, many of them Board employees, the court found that the Board's parole notification, hearing, and appeals process depended to a great extent on written forms.[10] Whether in prison or outside, disabled prisoners and parolees were provided with inadequate accommodations to help them understand the content of those forms,[11] and as a consequence some plaintiffs waived their rights to a hearing and others failed to invoke their rights on appeal. Even if disabled prisoners or parolees made it to the hearing, a variety of barriers made participation extremely difficult and access to the facilities impractical."[12]

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9. As we have noted, defendants do not appeal the court's factual findings.

10. [T]he BPT . . . relies on extensive written communications, and some verbal interaction, to make . . . decisions [concerning parole or parole revocation] . . . The BPT relies on written notices and forms to communicate vital information about prisoners' and parole status, and the BPT's procedures, to those prisoners and parolees.

11. "Defendants' forms and notices are not provided in alternative forms suitable for prisoners and parolees with vision or hearing impairments, or for learning or developmentally disabled prisoners or parolees. Furthermore, Defendants' policies and procedures for access to supporting documents and files, screening offers, hearings and appeals do not allow for effective communications with Plaintiff class members."

"[T]here are numerous examples of the BPT's failure to provide such auxiliary aids and services. . . . [T]he BPT failed to provide effective American Sign Language interpretation services to hearing impaired prisoners and parolees, failed to provide Braille materials, large print materials, audio tapes or qualified readers for visually impaired prisoners and parolees, failed to provide qualified readers for learning disabled prisoners and parolees, and failed to provide trained staff capable of effectively communicating with mentally retarded or learning disabled prisoners and parolees."

12. Among other violations . . . the BPT has failed to modify its

The district court held that the Board failed to implement "a number of specific requirements [prescribed by the regulations implementing the ADA] designed to ensure that the framework exists for a public entity to carry out the substantive mandates of the ADA." Most particularly, the Board's mandatory self-evaluation plan was conducted "more than four years late [and] is inadequate."[13] Similarly, the district court held that the Board's transition plan was" inadequate,"[14] and that the notice provided to prisoners and parolees was "insufficient to apprise prisoners and parolees of the ADA's 'applicability to the services, programs, or activities' of the BPT or to 'apprise such persons of the protections against discrimination assured them by' the ADA." Both the transition plan and the notice forms were completed five years late. The court also held that the Board failed to provide the required ADA grievance procedures.

Ultimately, the district court held that the Board was not in substantial compliance with the ADA or the Rehabilitation Act, and that it routinely denied plaintiffs their rights under the Due Process Clause of the United States Constitution.

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programs to remedy . . . accessibility and communications barriers. Moreover, the BPT has failed to consider disabled prisoners' inability to participate in the vocational and educational programs of the CDC when considering whether to recommend a life prisoner for parole."

13. "The BPT's self-evaluation did not address the screening process, appeal process, adequacy of forms or other important element's of the BPT's programs and activities."

14. "The Self-Evaluation and Transition plan did not identify a single barrier to access, an omission which Plaintiffs' expert . . . had never encountered in the hundreds of Self-Evaluation and Transition Plans he has reviewed. . . . Accordingly, the . . . Plan did not discuss the methods or standards to use to eliminate or mitigate physical and communicative barriers to accessing the BPT's programs and services."

3. Injunctive Relief

After finding in favor of the plaintiffs, the district court entered an injunction requiring the Board to evaluate its policies, procedures, and facilities, as mandated by the ADA; to propose new policies and procedures to bring the Board into compliance with the Act, and then to attempt to reach an agreement on them with plaintiffs; to take specific steps toward ensuring that the facilities it uses are accessible; and to determine, with the participation of plaintiffs, the manner in which the Board's compliance with the injunction should be monitored. The injunction applies to:

> all hearings conducted by the BPT to determine whether and/or when a prisoner or parolee should be released on parole or involuntarily confined, including parole revocation and revocation extension hearings, life prisoner hearings (documentation hearings, progress hearings, parole hearings, parole consideration hearings, parole date rescission hearings and parole board rules hearings), mentally disordered offender hearings and sexually violent predator hearings. Parole proceedings also include any events related to the hearings that occur prior to or after the hearings, including, but not limited to, screening offers, psychological evaluations, central file reviews and administrative appeals.

The court required the Board to hire a full-time ADA coordinator and to do over its Self-Evaluation and Transition Plan, this time according to standards set by the court. To comply with the injunction, the Board was required to redraft its policies to ensure that prisoners and parolees are provided with effective communications or otherwise "able to participate, to the best of their abilities, in any parole proceeding." The Board was to identify in advance of such proceedings which prisoners have a disability, create and maintain a system for tracking disabled prisoners and parolees, and provide them with

accommodations at parole and parole revocation proceedings.[15] Under the terms of the injunction, the Board was also ordered to: revise all BPT forms used by prisoners and parolees to make them more comprehensible; provide alternative formats for all BPT forms used by prisoners and parolees; desist from shackling, during parole and parole revocation proceedings, the hands of hearing-impaired prisoners or parolees who use sign-language to communicate, unless prior approval is obtained; provide accommodations for prisoners or parolees who need to review their files in preparation for parole or revocation proceedings; provide accommodations for prisoners or parolees filing appeals from such proceedings; and establish grievance procedures by which prisoners may complain about ADA violations. Every official to whom the Board assigned responsibility for communicating with or supervising prisoners or parolees, including the Department's district hearing agents and correctional counselors, was required to undergo training in the general requirements of the ADA, disability awareness, the appropriate method of determining whether a prisoner adequately understands written and verbal communications, and other relevant policies and procedures developed in response to the injunction.

The court also ordered the Board to determine which facilities used to conduct parole proceedings were in compliance with the administrative regulations implementing the ADA; inform the Department of the facilities that were not fully accessible;[16] publish a description of any structural modifications to a facility that will make the parole proceedings accessible or identify another accessible location in which the proceedings will be held; and provide a schedule for making proceedings accessible for prisoners and parolees with

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15. The court order requires the Board to give the prisoner's or parolee's requested accommodation primary consideration when determining what accommodation to provide.

16. The Board was additionally to describe what parts of the facility are not accessible and what disabilities are not accommodated.

disabilities at each Department facility or at an alternative accessible location. It did not, however, order the Board to make any physical changes to facilities, and it did not order the Department to take any action at all.

After engaging in the negotiations required by the injunction, the Board and the plaintiffs submitted a stipulation and proposed order, which was entered by the court, that delineated the "policies and procedures . . . developed by defendants pursuant . . . to the injunction and which fulfil [its] policy development obligations." The Board's new policies complied completely with the terms of the injunction. At oral argument before this court, the Board represented that it had implemented most of the new policies and practices agreed upon in the stipulation, that the court-ordered compliance with federal law did not cause it any practical difficulties, and that the outcome of this lawsuit would not affect the implementation of those policies and practices. Nevertheless, it determined that this appeal should be pursued.

II. DISCUSSION

A district court's decision to grant prospective, system-wide injunctive relief is usually the product of a series of procedural decisions as well as a determination on the merits of the case. This case was no different. On appeal, however, the Board does not challenge the underlying merits decision, but instead raises a number of primarily procedural objections to the injunction. The Board challenges plaintiffs' standing, class certification, and the propriety and scope of injunctive relief. It argues that the named plaintiffs do not have standing to seek prospective relief; that, if they do, any relief should be limited to the named plaintiffs; that system-wide relief is not warranted for a number of reasons; that the injunction is not narrowly tailored to the injury asserted; that the injury and the acts required to remedy that injury are chargeable to the Department, not to it, and that the decree in the Department portion of the case precludes further relief in such circumstances; and, finally,

that it is excused from compliance with the requirements of the ADA and the Rehabilitation Act in this case by virtue of legitimate penological justifications. In addition, appellees argue that defendants Gray Davis and Robert Presley should be dismissed.

We start by noting that where a district court grants system-wide injunctive relief, the issues of standing, class certification, and the propriety and scope of relief are often intermingled. *See, e.g., City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). As a result, the district court's findings of fact and rulings of law with regard to one aspect of the litigation will often buttress or make unnecessary further findings or rulings on another issue. For example, we have held that determinations relevant to standing, *see Hodgers-Durgin v. De La Vina*, 199 F.3d 1037, 1040 (9th Cir. 1999) (en banc), or to class certification, *see Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1237 (9th Cir. 2001), will also be relevant to the grant of injunctive relief; and that determinations made with respect to class certification may also be relevant to the standing inquiry. *See LaDuke v. Nelson*, 762 F.2d 1318, 1326 (9th Cir. 1985); *Hawkins*, 251 F.3d at 1237. Similarly, because the court may reconsider whether the plaintiffs have standing or have been appropriately certified as a class at the trial stage of the litigation, *see Lewis v. Casey*, 518 U.S. 357 (1996), the court's findings at trial may be bolstered by its rulings at earlier stages of the litigation.

A. Standing

The Board has challenged the district court's ruling on standing. We reiterate, however, that it did not challenge the factual findings on appeal, including those that support the district court's standing determination: while it argued that some of the legal conclusions were wrong, it did not object to any findings of fact or identify any specific errors regarding them as required by Federal Rule of Appellate Procedure 28(a)(7). Because the other elements of the "case "or "controversy"

requirements have been met, we focus on the "injury in fact" requirement of Article III standing. *See Bennett v. Spear*, 520 U.S. 154, 162 (1997).

[1] In order to assert claims on behalf of a class, a named plaintiff must have personally sustained or be in immediate danger of sustaining "some direct injury as a result of the challenged statute or official conduct." *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). The harm suffered by a plaintiff must constitute "actual injury." *Lewis*, 518 U.S. at 348-349. Moreover, where, as here, a plaintiff seeks prospective injunctive relief, he must demonstrate "that he is realistically threatened by a repetition of [the violation]." *Lyons*, 461 U.S. at 109 (emphasis added) (holding that plaintiff cannot establish the requisite type of harm simply by pointing to some past injury). We review questions of standing de novo. *See Tyler v. Cuomo*, 236 F.3d 1124, 1131 (9th Cir. 2000) (citation omitted). However, we will affirm standing when a district court has made "explicit" and "specific" findings establishing that the threatened injury is sufficiently likely to occur, *LaDuke*, 762 F.2d at 1323-24; *see also Hawkins*, 251 F.3d at 1237 (citing *LaDuke*), unless those findings are clearly erroneous.

There are at least two ways in which to demonstrate that such injury is likely to recur. First, a plaintiff may show that the defendant had, at the time of the injury, a written policy, and that the injury "stems from" that policy. *Hawkins*, 251 F.3d at 1237. In other words, where the harm alleged is directly traceable to a written policy, *see Gomez v. Vernon*, 255 F.3d 1118, 1127 (9th Cir. 2001), there is an implicit likelihood of its repetition in the immediate future. Second, the plaintiff may demonstrate that the harm is part of a" pattern of officially sanctioned . . . behavior, violative of the plaintiffs' [federal] rights." *LaDuke v. Nelson*, 762 F.2d 1318, 1323 (9th Cir. 1985). Thus, where the defendants have repeatedly engaged in the injurious acts in the past, there is a sufficient possibility that they will engage in them in the near future to satisfy the "realistic repetition" requirement. In this regard, where the

plaintiffs constitute a certified class, "it is not irrelevant that [the named plaintiffs] seek to represent broader interests than [their] own." *LaDuke*, 762 F.2d at 1326. When a named plaintiff asserts injuries that have been inflicted upon a class of plaintiffs, we may consider those injuries in the context of the harm asserted by the class as a whole, to determine whether a credible threat that the named plaintiff's injury will recur has been established. *Id.*; *see also Hawkins*, 251 F.3d at 1237.

[2] Where a court, through its specific factual findings, documents the threat of future harm to the plaintiff class and establishes that the named plaintiffs (or some subset thereof sufficient to confer standing on the class as a whole) are personally subject to that harm, the "possibility of recurring injury ceases to be speculative," and standing is appropriate. *Thomas v. County of Los Angeles*, 978 F.2d 504, 507 (9th Cir. 1993) (citation omitted). In the instant case, it is difficult to conceive of how the district court's seventy-four pages of factual findings could have been more diligent, detailed, or comprehensive, given the limitations of time and space available to our trial courts. Defendants do not challenge those findings on appeal, and they form the basis of our discussion of the Board's ADA policy and practice.

1. Written Policy

The Board's written policy is primarily contained in three documents: its Self-Evaluation and Transition Plan, its Administrative Directive, and its training documents, including guidelines provided to the Department employees. That policy was formulated to ensure that prisoners and parolees receive *due process* with respect to Board proceedings. Whether the Board succeeded in that objective is not of particular importance here. The ADA and Rehabilitation Act, as enforced through the Attorney General's regulations promulgated under the ADA, *see* 42 U.S.C. § 12134(a), require more than compliance with due process requirements: they require that a disabled individual be provided with "meaningful access" to state provided services

and set forth a number of detailed requirements that must be met. *See Alexander v. Choate*, 469 U.S. 287, 295, (1985); *see also Crowder v. Kitagawa*, 81 F.3d 1480, 1484 (9th Cir. 1996).[17] The Board's written policy does not consider the particular needs of disabled prisoners and parolees. In particular, the policy does little, if anything, to address the needs of prisoners or parolees who have problems understanding complex information or communicating through the spoken or written word.

The Board's ADA policy relies upon form # 1073 at the notification stage and form # 1040 at the appeal stage. Form # 1073 purports to inform prisoners and parolees of their rights under the ADA.[18] Both forms are inadequate for the visually impaired, for those deaf individuals who do not understand written English, and for the learning disabled or mentally retarded who do not understand complex concepts. At the notification stage, the Board's only solution is to have a person serving the form explain it to the person served, if requested to do so; at the appeals stage, the Board does not even require that

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17. Because "[t]he Rehabilitation Act is materially identical to and the model for the ADA, except that it is limited to programs that receive federal financial assistance -- which the [California] prison system admittedly does [and] since the ADA has a broader scope, we will confine our discussion to it." *Crawford v. Indiana Dep't of Corr.*, 115 F.3d 481, 483 (7th Cir. 1997), *abrogated on other grounds by Erickson v. Board of Governors of State Colls. and Univs. for Northeastern Ill. Univ.*, 207 F.3d 945 (7th Cir. 2000).

18. Form # 1073 repeats the language from the ADA stating that "no qualified individual with a disability shall, on the basis of disability, be excluded from participation in, or be denied benefits of the services, activities, or programs of a public entity, or be subjected to discrimination by any such entity." *See* 42 U.S.C. § 12132. If the prisoner or parolee is identified as having a disability under the ADA, either he or the serving officer must complete the form to describe the disability, how the disability prevents effective participation at the Board hearing, and what accommodation is requested, and the prisoner or parolee must state the means by which he can verify his disability.

accommodation: so long as someone renders some assistance, the policy is satisfied. The Board does not train its officials or employees to communicate with disabled individuals, and does not evaluate their ability to do so. The district court found that the minimal due process measures taken by the Board were insufficient to comply with the ADA or to enable plaintiffs properly to invoke or assert their rights.

The guidelines prepared by the Board and circulated to Department officials contemplate two forms of accommodation: the provision of an attorney or of an interpreter. These accommodations are offered primarily at the discretion of the Department employees, and they need not be provided where the employee believes that the prisoner or parolee has little likelihood of success on the merits at the hearing.[19] Even when an accommodation is furnished it is often ineffective, and the lack of appropriate accommodations has resulted in prisoners and parolees waiving or misunderstanding their rights at the

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19. Timothy Whisman, who is learning disabled, was denied the assistance of an attorney at parole revocation hearings. He had difficulty understanding the paperwork and the proceedings. David Rose, who is deaf, requires an interpreter to communicate effectively. He was denied an interpreter for his parole revocation hearing, even though he told the parole officer he could not understand what was being said. Kiah Mincey, who is legally blind, was denied the assistance of an attorney for his parole revocation hearing and was not allowed a reader at the hearing.

notification stage; being prevented from adequately preparing for hearings; failing to understand proceedings during hearings; and being unable to assert grievances on appeal.[20/]

The Board's written policy does not provide for the making of any effort to determine in advance whether a particular hearing facility is accessible for the mobility impaired. Instead, if a deputy commissioner is informed that there is a physical barrier to access, he will halt the hearing until a reasonable accommodation can be made. Such a procedure results in mobility-impaired prisoners and especially parolees spending extra time in custody awaiting their hearing.

[3] In sum, the Board's written policy does not comply with the requirements of the ADA. As a general rule, injuries can stem from a failure to take action as well as from affirmative conduct. Here, plaintiffs were injured by the Board's failure to comply with the Act's requirements. They suffered discrimination on account of disability as a consequence, including the impairment or loss of services or programs provided by the Board. The Board's failure to comply also makes likely the recurrence of such injuries in the immediate future.

2. Practice

[4] The Board's practice is to rely primarily on Department employees untrained in issues of disability to determine whether

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20. James Simmons, who is mildly to moderately mentally retarded, did not understand the proceedings at his parole hearing even though he was represented by an attorney. Elio Castro, who is mentally retarded and partially deaf, could not understand the proceedings during his hearing because the interpreter signed too quickly and used unfamiliar vocabulary. Willie Johnson, who is legally blind, was unable to review adequately his central file in preparation for his hearing because the reader placed a limit on the number of documents she would review with him. Johnson was unable to appeal from his hearing because he lacked help filling out the forms.

an individual is disabled or not, what accommodations are appropriate if he is, and whether those accommodations will be provided. These employees include the Department's institutional staff in the case of state inmates subject to life prisoner parole proceedings, and members of the Department's Parole and Community Services Division, acting on behalf of the Board, in the case of individuals subject to parole revocation proceedings. At the notification stage, disabled prisoners and parolees routinely waive their rights to hearings, frequently because they cannot comprehend the information provided to them.[21] Relatively few Department employees make inquiries in order to determine whether an accommodation is needed, and the Board's ADA officials who evaluate both such inquiries and inquiries made by the Board's hearing officers, do so on the basis of a "due process" standard that does not comport with the requirements of the ADA. In practice, the Board supplies only the three types of accommodation described above -- an attorney untrained in communications with the disabled; a similarly untrained interpreter; or a delay in proceedings while the hearing is rescheduled.

In conjunction with the Board's written policy, its practice throughout the parole and parole revocation process routinely deprives disabled prisoners and parolees of their rights under the ADA. The Board's practice, consistent with its policies, permits Board and Department employees to deny appropriate accommodations requested by disabled prisoners and parolees, and instead to rely on a narrow and unsatisfactory range of alternatives. The Board's adherence to its "due process" standard undermines the ability of disabled prisoners and

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21. For example, Flora Abrams and Joey Gough, who are learning disabled, David Badillo, who is mildly to moderately mentally retarded, and David Blessing, who is deaf, all waived their rights to parole revocation hearings because the Board failed adequately to communicate their rights to them. Clifton Feathers, who is blind, did not know he could be provided with a reader to help him review his central file in preparation for his forthcoming hearing.

parolees to communicate with and comprehend Department and Board officials, at hearings and otherwise, and precludes the mobility impaired from access to hearings. Such treatment not only results in offense and frustration; it appears to have resulted in significant periods of unwarranted incarceration for a number of disabled parolees. Thus, as in the case of its written policy, the Board's practices warrant the holding that the "realistic repetition" requirement has been met, and that the named plaintiffs have established standing.

3. Plaintiff Class

Class membership may also be relevant to show an immediate likelihood of future injury. Where a named plaintiff is a member of a plaintiff class, and "[members of the class have repeatedly suffered personal injuries in the past that can fairly be traced to the [defendants'] standard . . . practices," the defendant's treatment of the class as a whole must be considered to determine whether the individual plaintiff" has been and will continue to be aggrieved by the defendants' [illegal] pattern of conduct." *LaDuke*, 762 F.2d at 1326. Here, plaintiffs provided overwhelming evidence of discrimination against the named plaintiffs as well as other, individually identified class members. That discrimination stretches back, in some instances, over ten years, and at the time of trial showed no signs of abating. The injury suffered by the named plaintiffs is sufficiently similar to that endured by the rest of the class to establish a pattern of discrimination that threatens to recur. The district court made findings of fact, which have ample support in the record, that named plaintiffs suffered repeated acts of discrimination, whether in prison or on parole. Accordingly, based on past occurrences, the threat of future injury to the named plaintiffs as well as to the class itself is both real and immediate.

4. Actual Injury

[5] The named plaintiffs are injured by the Board's policies and practices relating to its parole and parole revocation proceedings: plaintiffs are subjected to discriminatory treatment on account of their disabilities in violation of both the ADA and the Rehabilitation Act. This treatment is sufficient to constitute an actual injury. Furthermore, as a consequence of the Board's unlawful discrimination, plaintiffs were unable to comprehend various parts of the parole and parole revocation process or denied the opportunity to attend the required hearings, and may even have been wrongfully incarcerated or denied parole. This too constitutes actual injury.

We comment briefly on the Board's contention that the deprivation of a fair parole hearing can not in itself constitute such injury. The Board contends that California Penal Code § 3041 does not create a fourteenth amendment due process right to such a hearing. However, following *Ellis v. District of Columbia*, 84 F.3d 1413, 1418 (D.C. Cir. 1996) (holding that, until Supreme Court speaks more directly to the issue, prisoners' right to pre-release revocation hearing unaffected by holding in *Sandin v. Conner*, 515 U.S. 472 (1995)), we hold that the statute is sufficiently determinate to require such hearings as a matter of constitutional right. Thus, we need not find a constitutional violation to establish actual injury under the ADA and the Rehabilitation Act. In addition to prohibiting discriminatory treatment, those statutes prohibit defendants from denying plaintiffs "the benefits of [their] services, programs, or activities." Here, under the facts found by the district court, the plaintiffs were denied such benefits by virtue of the Board's failure to make accommodations that would enable them to attend or comprehend parole and parole revocation hearings. This, in itself, constitutes "actual injury."

Our holding is consistent with *Lewis*, in which the plaintiffs' asserted injury resulted from inadequate library facilities. The Supreme Court held that there was no right to

library facilities, but only a right to access to courts, and that in most cases prisoners had failed to show how the prison's library policy infringed upon that right, given that other means of accessing the courts were available. It did, however, find actual injury in two instances, one of which was when a prisoner was "so stymied . . . that he was unable to file a complaint" to remedy an "arguably actionable" harm. 518 U.S. at 351. Thus, *Lewis* simply requires that in order to show actual injury plaintiffs must identify an actual right that has been violated. Here, actual injury exists because plaintiffs' rights to be free from discriminatory treatment, as provided by the ADA and the Rehabilitation Act, have been violated, and because they have been deprived of services or programs provided by the Board: fair parole and parole revocation hearings. Either violation, standing alone, is sufficient to constitute actual injury.

5. The Board's Objections to Standing

Defendants argue that the plaintiffs cannot meet the" likelihood of repetition" requirement, because their right to parole and parole revocation hearings depends upon their engaging in illegal conduct that they are under an obligation to avoid. Although we have held that there is sufficient likelihood that an injury inflicted during a hearing will be repeated when a plaintiff can assert a right to another such hearing, *see Hawkins*, 251 F.3d at 1237, nonetheless, standing is inappropriate where the future injury could be inflicted only in the event of future illegal conduct by the plaintiff. *Lyons*, 461 U.S. at 108. *See also Hodgers-Durgin v. De La Vina*, 199 F.3d 1037, 1041 (9th Cir. 1999) (en banc) (no standing where injury" contingent upon respondents' violating the law, getting caught, and being convicted.").

With respect to the prisoners' complaints regarding conditions at their various hearings, the Board's regulations require that prisoners sentenced to life with the possibility of parole be provided with certain hearings as a matter of formal Board policy. These include documentation hearings, progress

hearings, and recission hearings, as well as the parole hearings themselves. No matter how well behaved the prisoners are, no matter how pure and proper their conduct, they must receive the specified hearings, so that the Board may document or determine their parole suitability. The Board's regulations establish that prisoners of the type before us are entitled to parole hearings before the Board at least every five years, and as often as every year, unless they waive those hearings. The likelihood that a prisoner will be subjected to the hearings involved is, therefore, not at all speculative; rather, it is certain. The lawfulness or unlawfulness of his conduct in the interim is irrelevant to that fact.

The situation is different with respect to the complaints of parolees regarding deprivations of their rights in connection with the parole revocation process. The Board asserts that these plaintiffs could avoid parole revocation hearings entirely by refraining from engaging in future illegal conduct. For support of this proposition, it relies on *Lyons*, 461 U.S. at 102 (no standing where likelihood of further injury premised on repetition of unlawful traffic violation); *O'Shea*, 414 U.S. at 497 (no standing where plaintiffs planned to induce future injury by unlawful civil disobedience); and *Spencer v. Kemna*, 523 U.S. 1, 13 (1998) (no standing where future injury will not arise unless plaintiff has been convicted of and served sentence for future unlawful conduct). To the extent that these cases hold that standing does not exist where plaintiffs can avoid future injury by refraining from illegal conduct, they are not apposite here.

In *Hodgers-Durgin*, we expressly distinguished the *Lyons* line of cases on the basis that the *Hodgers-Durgin* plaintiffs asserted that the conduct on their part that triggered the defendants' violations was not unlawful. In that case, the plaintiffs alleged that while driving their vehicles in the normal course, they were stopped by the United States Border Patrol on the basis of their race, or because of their proximity to the border. We found that the plaintiffs had standing because,

although the police were sufficiently suspicious of the plaintiffs to stop, question, and search them, "plaintiffs did nothing illegal to prompt the stops by the Border Patrol." *Hodgers-Durgin*, 199 F.3d at 1041.[22]

Here, as in *Hodgers-Durgin*, plaintiffs need not engage in unlawful conduct to become subject to the unlawful practices they seek to enjoin. The Board is not required to establish probable cause to begin the parole revocation process, nor is it necessary that any law enforcement officer observe the alleged violation:[23] the Board may start parole revocation proceedings when a rather low level of suspicion arises as the result of "some minimal inquiry" into the facts of the case. *See Morrissey v. Brewer*, 408 U.S. 471, 485 (1972).[24] However, mere suspicion of misconduct is insufficient to defeat standing: in Hodgers-Durgin, although the Border Patrol officers were suspicious enough to stop, question, and search the plaintiffs' cars, we still found that the plaintiffs had standing to sue.[25]

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22. By contrast, in *Lyons*, 461 U.S. at 102, a police officer observed the traffic violation that led to Lyons's injury and Lyons did not deny his guilt.

23. Parolees are subject to a parole revocation hearing when a member of the Parole and Community Services Division reports a suspected violation of the conditions of parole to the Board. *See* Cal. Code Regs. tit. 15 § 2615.

24. Prior to a parole revocation hearing the Board serves notice of the hearing on the parolee and, at the same time, presents him with a form explaining his rights under the ADA (form # 1073) and a "screening offer:" a determinate prison sentence of one year or less conditioned upon the parolee's agreement to waive his revocation hearing. By accepting the screening offer without properly comprehending its import, some of the parolee-plaintiffs agreed to prison sentences on the first occasion that they were informed that they were subject to parole revocation proceedings, and well before the Board had anything more than the limited degree of suspicion required to subject them to such hearings.

25. In *Hodgers-Durgin*, we additionally noted that, unlike *Lyons* there was "no string of contingencies necessary to produce an injury" after

Next, the Board contends that the named plaintiffs have failed to demonstrate standing for "each type of relief sought," and cite *Lewis v. Casey* for that proposition. However, *Lewis* simply limits standing to the injury shown: a plaintiff who has been subject to injurious conduct of one kind does not have standing to sue for a different, although similar, injury to which he has not been subjected. 518 U.S. at 358 n. 6. When determining what constitutes the same type of relief or the same kind of injury, we must be careful not to employ too narrow or technical an approach. Rather, we must examine the questions realistically: we must reject the temptation to parse too finely, and consider instead the context of the inquiry. Viewed in this light, the named plaintiffs all established the same injury: that the Board propounded a policy and engaged in a practice that denied them their rights under the ADA, and harmed them by preventing them from attending, communicating at, or comprehending parole and parole revocation hearings. Each showed that the Board discriminated against him, in a manner that resulted in a failure to afford him the benefit of the same service or program. As a result, it is evident that each suffered from the same injurious conduct; each incurred the same injury; and each is seeking the same relief.

The Board also asserts that the likelihood that the parolee plaintiffs will be subject to a future parole revocation hearing is purely speculative. However, five of the parolee plaintiffs were repeatedly subjected to parole revocation proceedings, some of them on a yearly basis. Abrams, Whisman, Blessing, and Badillo, waived their rights to a parole hearing because the accommodations provided did not enable them to comprehend the notification proceedings; Gough was unable to understand the notification or hearing process. Because the named-plaintiff

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the stop: the stop led inexorably to the injury. 199 F.3d at 1041-1042. Here, it is the parole revocation notification and hearing process itself that is discriminatory and that constitutes the injury: the discriminatory treatment incurred by persons with disabilities and the failure to provide them with statutory services.

parolees can establish a pattern of continuing discrimination that shows no sign of abating, we find that the parolee plaintiffs have standing to sue for a violation the ADA.

Our conclusion is bolstered by the fact that a person with disabilities is more likely to be suspected of conduct that results in the revocation of parole than other parolees. The district court specifically found that hearing impaired, learning impaired, and developmentally disabled individuals engage in a range of coping mechanisms that can give the false impression of uncooperative behavior or lack of remorse. It is therefore likely that these individuals will have difficulty interacting with the personnel who supervise their parole, explaining any innocent but non-conforming behavior, and showing remorse for otherwise minor infractions of the conditions of their parole that do not rise to the level of unlawful conduct. These problems make it more likely that such parolees will be subjected to the parole revocation process, even though they have not committed any unlawful act or violated any condition of their parole.

B. Class Certification

The district court's decision certifying the class is subject to a "very limited" review and will be reversed "only upon a strong showing that the district court's decision was a clear abuse of discretion." *In re Mego Financial Corp. Secs. Litig.*, 213 F.3d 454, 461 (9th Cir. 2000) (citation omitted). As a preliminary matter, we note that, after the evidentiary hearing on the first motion for class certification, the state defendants stipulated to a motion amending the plaintiff class, and then did not object when the class was amended a second time at the pre-trial hearing. Furthermore, the district court's findings of fact generally support its grant of class certification.

[6] Under Federal Rule of Civil Procedure 23(a), "one or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that

joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." In addition, to prosecute a class action, the plaintiffs must show that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief . . . with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2).

In the instant case, the Board asserts that the named plaintiffs fail to satisfy the standards of commonality and typicality required by Federal Rule of Civil Procedure 23(a). Although the commonality and typicality requirements tend to merge into one another, *see General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 157 n. 13 (1982), they are stated differently. The commonality requirement is said to be met if plaintiffs' grievances share a common question of law or of fact. *See Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994). Typicality, by contrast, is said to require that the claims of the class representatives be typical of those of the class, and to be "satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Marisol v. Giuliani*, 126 F.3d 372, 376 (2nd Cir. 1997). The crux of both requirements is to ensure that "maintenance of a class action is economical and [that] the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Id.*

1. Commonality

[7] The Board argues that a wide variation in the nature of the particular class members' disabilities precludes a finding of commonality. It asserts, in effect, that separate representative lawsuits should be filed by the hearing impaired, the vision impaired, the developmentally disabled, the learning impaired,

and the mobility impaired. We reject this approach to class-action litigation. We have previously held, in a civil-rights suit, that commonality is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members. *See LaDuke*, 762 F.2d at 1332; *see also* 5 James Wm. Moore et al., *Moore's Federal Practice* ¶23.23[5][f] (3d ed. 1999) (citing *LaDuke*). In such circumstance, individual factual differences among the individual litigants or groups of litigants will not preclude a finding of commonality. *See Baby Neal*, 43 F.3d at 56. Certainly, the differences that exist here do not justify requiring groups of persons with different disabilities, all of whom suffer similar harm from the Board's failure to accommodate their disabilities, to prosecute separate actions. The commonality requirement is met.

2. Typicality

[8] Where the challenged conduct is a policy or practice that affects all class members, the underlying issue presented with respect to typicality is similar to that presented with respect to commonality, although the emphasis may be different. In such a case, because the cause of the injury is the same -- here, the Board's discriminatory policy and practice -- the typicality inquiry involves comparing the injury asserted in the claims raised by the named plaintiffs with those of the rest of the class. We do not insist that the named plaintiffs' injuries be identical with those of the other class members, only that the unnamed class members have injuries similar to those of the named plaintiffs and that the injuries result from the same, injurious course of conduct. *See Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). Here, the injuries are identical. The plaintiffs all suffer a refusal or failure to afford them accommodations as required by statute, and are objects of discriminatory treatment on account of their disabilities. On a more specific level, the injuries lie in the inability of prisoners and parolees with disabilities to comprehend what is occurring at the parole and parole revocation hearings and to communicate with those presiding (or in some instances even to obtain such

hearings) and, in the case of mobility impaired individuals, to overcome the physical barriers to attendance. Thus, the plaintiffs all suffer the deprivation of "services, programs, or activities," provided by the Board, or fail to receive the full benefit of such services. 42 U.S.C. § 12132. Although there are minor differences in the nature of the specific injuries suffered by the various class members, the differences are insufficient to defeat typicality.

3. Defective Certification

While the class certification is generally proper, it is defective in two respects. First, in addition to the prisoners and parolees with sight, hearing, learning, developmental and mobility disabilities, the district court designated individuals with kidney disabilities as members of the class. As amended, however, the class no longer includes a named plaintiff with a kidney disability. We are unable to determine from the district court's decision or the parties briefs (which do not mention the subject) what injuries, if any, prisoners or parolees with renal disorders suffer as a result of the defendants' failure to comply with the law. Accordingly, should the plaintiffs wish to maintain a claim on behalf of prisoners and parolees with kidney disabilities, they would have to amend the complaint to include one or more individuals with such disabilities among the named plaintiffs, and set forth the facts showing how they are injured.

Second, in addition to life prisoner hearings, parole revocation hearings, and parole revocation extension hearings, the plaintiffs challenge the Board's procedures relating to the hearing process for Sexually Violent Predators and Mentally Disordered Offenders.[26/] None of the named plaintiffs,

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26. *See* Cal. Penal Code § § 2960-2981 (mentally disordered offenders); Cal. Code Regs. tit. 15 § 2600.1 (sexually violent predators). The Board's rules regulating the treatment of mentally disordered offenders provide for three hearings: a certification hearing, Cal. Code Regs. tit. 15 §

however, is a sexually violent predator or a mentally disordered offender. Those two categories of putative class members may be sufficiently distinct from the other class members that separate class representatives are necessary in order to ensure that their interests are fairly and adequately protected. *See Hanon*, 976 F.2d at 508. At least, on the record presented, we cannot say they are sufficiently similar. On remand, plaintiffs may choose to add additional named plaintiffs to represent the claims of sexually violent predators and mentally disordered offenders, "or to otherwise refashion this action to remedy class defects." *Hawkins*, 251 F.3d at 1238.

C. Scope of Injunctive Relief

The district court identified three general areas in which the Board did not comply with the mandatory provisions of the ADA and the regulations implementing that Act by failing to: (1) provide effective communications during the notification, hearing, and appeals process; (2) modify policies and procedures to provide reasonable accommodations to disabled prisoners and parolees; and (3) select facilities accessible to the mobility-impaired. After making detailed factual findings on each of these issues, the court specified the manner in which the Board violated the ADA, holding that the defendants "have engaged in ongoing, extensive, system-wide violations of the ADA, Section 504 and the Constitution. . . . Systemic injunctive relief in this case is therefore justified." The injunctive relief granted was deliberately and particularly tailored to address each of the violations identified in the district court's order. The Board contends that the relief awarded is overbroad for two reasons: (1) the district court should have considered only the

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2570(a); a placement hearing, § 2570(e); and an annual review hearing, § 2570(k). Sexually violent predators are subject to a screening hearing under Cal. Code Regs. tit. 15 § 2600.1.

injuries suffered by the named plaintiffs, and limited relief accordingly; and (2) federalism concerns preclude the court from anything other than the most minimal interference in a state parole system.

1. System-Wide Relief

[9] "The scope of injunctive relief is dictated by the extent of the violation established." *Lewis*, 518 U.S. at 359. The key question, for purposes of *Lewis*, is whether the inadequacy complained of is in fact "widespread enough to justify system wide relief." *Lewis*, 518 U.S. at 359. Lewis reiterates the longstanding maxim that injunctive relief against a state agency or official must be no broader than necessary to remedy the constitutional violation. *See Milliken v. Bradley*, 433 U.S. 267, 280 (1977). System-wide relief is required if the injury is the result of violations of a statute or the constitution that are attributable to policies or practices pervading the whole system (even though injuring a relatively small number of plaintiffs), or if the unlawful policies or practices affect such a broad range of plaintiffs that an overhaul of the system is the only feasible manner in which to address the class's injury. However, if injunctive relief is premised upon only a few isolated violations affecting a narrow range of plaintiffs, its scope must be limited accordingly.[27]

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[27] When plaintiffs seek relief against a state agency, but relief on behalf of a large class of plaintiffs is inappropriate, we will limit relief to the named plaintiffs. *See Gomez v. Vernon*, 255 F.3d 1118, 1130 (9th Cir. 2001) (where class relief inappropriate, prospective relief properly limited to just six inmates); *see also Rizzo v. Goode*, 423 U.S. 362 at 367-69 (where only two of 28 alleged incidents, involving only two police officers, involved deprivation of a federal right, broad-based relief not warranted); *Lyons*, 461 U.S. at 97-100 (single plaintiff's allegation that his constitutional rights were violated insufficient to justify city-wide injunctive relief). By contrast, where the district court makes findings of fact sufficient to demonstrate a system-wide injury, resulting from policies and practices that pervade the state institution, widespread relief is justified to remedy that injury. *See Lewis*, 518 U.S. 360 n. 7 (prisoners must prove that denial of

We also note that the decision to grant system-wide prospective injunctive relief does not occur in a vacuum; it is intimately connected to determinations made earlier in the lawsuit. The court's rulings concerning the likelihood of future injury at the standing stage "obviously shades into those determining whether the complaint states a sound basis for equitable relief." *Lyons*, 461 U.S. at 103 (citing *O'Shea*, 414 U.S. at 499). And the court's determination that relief may be sought by a class of plaintiffs is relevant to the scope of the relief to be awarded. In fact, class certification serves to alter the court's inquiry: when a class is properly certified, the injury asserted by the named plaintiffs at the standing stage of our inquiry is asserted on behalf of all members of the class. Accordingly, although in a class-action lawsuit, as in any other suit, "the remedy must . . . be limited to the inadequacy that produced the injury in fact that the plaintiff has established," *see Lewis*, 518 U.S. at 357, the "plaintiff" has been broadened to include the class as a whole, and no longer simply those named in the complaint.

[10] In this case, system-wide injunctive relief was justified by the district court's extensive findings of fact setting forth in meticulous detail the injuries suffered by seventeen different prisoners and parolees at a variety of Board facilities and hearings. The district court expressly noted that these findings were not limited to the individual prisoners and parolees named in its opinion, but extended to members of the class throughout the parole system. The Board's treatment of the seventeen individuals was symptomatic of its treatment of a broad class of inmates with disabilities; and all of the violations the court found stemmed from the policies and practices of the Board, permeated its institutions, and were condoned by officials ranging from Commissioner Nielsen to

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federal right pervaded system to justify system-wide relief).

the Board's deputy commissioners and Department officials acting as agents of the Board and under its guidelines. Such findings are sufficient to satisfy *Lewis*'s requirement that factual findings support the relief sought.

Furthermore, we note that *Lewis* does not require a particular number of named plaintiffs before system-wide relief is appropriate. In a class-action lawsuit, Rule 23(b)(2) enables a trial court to determine the appropriateness of system-wide relief based on the individual experiences of the named plaintiffs. The district court retains wide discretion to hear evidence tending to establish the scope of the class and the range of claims it represents. For class certification to occur, the court must find that the named plaintiffs adequately represent the interests and experiences of the overall class. In making such findings, the trial court must be afforded a wide degree of discretion to determine when a particular number of inmate witnesses is sufficient to justify system-wide relief for the identified violation. So long as the trial court's conclusion is based upon adequate findings supported by substantial evidence in the record, we must defer to its evaluation of the scope of the class and the injury it suffered. In so doing we recognize the utility and propriety of various procedural rules (like the class action device) that authorize the trial court to view individual items of evidence as representative of larger conditions or problems.[28/] The main concern of Lewis is to

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[28.] Federal Rule of Civil Procedure 23 provides district courts with broad discretion to determine whether a class should be certified, and to revisit that certification throughout the legal proceedings before the court. The district court may permit discovery to determine whether class certification is appropriate, *see Kamm v. California City Dev. Corp.*, 509 F.2d 205, 209 (9th Cir. 1975), may limit such discovery to class certification issues, and may make appropriate orders to control the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or an argument, Fed. R. Civ. P. 23(d)(4). Where appropriate, the district court may redefine the class, *see Penk v. Oregon State Bd. of Higher Educ.*, 816 F.2d 458, 467 (9th Cir. 1987), may excise portions of a plaintiffs class allegations, and may even

ensure that courts do not enter broader injunctions than are necessary, and do not prohibit conduct that is not threatened. (*See also supra* Part II. B) This is certainly not the case here.[29]

2. Prison Litigation Reform Act

[11] In determining the scope of injunctive relief that interferes with the affairs of a state agency, we must ensure, out of federalism concerns, that the injunction "heels close to the identified violation," *Gilmore v. California*, 220 F.3d 987, 1005 (9th Cir. 2000) (citation omitted), and is not overly "intrusive and unworkable . . . [and] would not require for its enforcement the continuous supervision by the federal court over the conduct of [state officers]." *O'Shea,* 414 U.S. at 500, 501. As we recently noted, these concerns have been codified in the Prison Litigation Reform Act, 18 U.S.C. § 3626 (PLRA).[30] *See Gomez v. Vernon*, 255 F.3d 1118, 1129 (9th Cir. 2001) (PLRA

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decertify the class. Fed. R. Civ. P. 23(d)(4). These procedural tools ensure that the district courts can fully investigate class certification issues, and require us to continue to give deference to the district court's decision on certification and the scope of the class through the remedy stage of the proceedings, unless the court abuses its discretion. *See Midgett v. Tri-County Metropolitan Transp. Dist. of Oregon*, 254 F.3d 846, 849 (9th Cir. 2001) (citation omitted).

29. Because the Board's violations of the ADA (and the Rehabilitation Act) are sufficient to support the issuance of the injunction before us, we need not consider whether the violations of the Due Process Clause found by the District court would provide an alternative basis.

30. The PLRA requires that prospective injunctive relief against a state prison system be "narrowly drawn, extend[]no further than necessary to correct the violation of the Federal right, and be the least intrusive means necessary to correct the violation of the Federal right." *Id.* at § 3626(a)(1). We note that the PLRA's provisions are explicitly limited to "prison conditions," and do not extend to the parole context. *Cf. Page v. Torrey*, 201 F.3d 1136, 1140 (9th Cir. 2000) (holding that parolee is not "prisoner" for purposes of PLRA). For the purposes of this section of our opinion, however, we will analyze the issues as if the PLRA applied to all aspects of the case.

"has not substantially changed the threshold findings and standards required to justify an injunction.").

[12] Here, the district court specifically made the findings required by the PLRA, *see* 18 U.S.C. § 3626(a)(1), and narrowly tailored the injunction to remedy only those violations of the ADA and Rehabilitation Act established in the district court's findings of fact. The court permitted the state to develop the policies and programs necessary to remedy its violation of the ADA and Rehabilitation Act, and afforded the plaintiffs an opportunity to objeet to the state's proposals.[31] The Board and the plaintiffs subsequently stipulated to the propriety of the new policies and procedures, and they have in fact been implemented.[32]

Although it is often difficult to discern the precise nature of the Board's arguments, it appears that the Board essentially objects not to the process that the district court employed, but to the content of the injunction. In particular, the Board appears to contend that the injunction improperly interferes with its activities by dictating particular remedies, including: employing a full-time ADA coordinator; training its staff and the attorneys provided to individuals with disabilities; providing assistance to parolees preparing for revocation hearings; ensuring the availability of forms in comprehensible alternative formats; and obtaining permission from a delegate of the Board Chairman

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31. This procedure is required by, among other cases, *Lewis*. 518 U.S. at 362. (court required to "giv[e] the States the first opportunity to correct the errors made in the internal administration of their prisons"). Here, the district court charged the Board with developing new policies and procedures to ensure compliance with the ADA, and the state responded by proposing policies and procedures, entering into negotiations with plaintiffs and stipulating to a new set of policies and procedures. This is precisely the process contemplated by *Lewis*.

32. Indeed, at oral argument, the Board stated that, should it prevail, it did not propose to change the new policies or procedures developed as a result of this lawsuit.

before permitting the shackling of an inmate who requires a sign-language interpreter at a parole or parole revocation hearing. The majority of the provisions of which the Board complains are required by regulations implementing the ADA and the Rehabilitation Act. *See* 28 C.F.R. § § 35.107 (ADA coordinator and grievance procedures) 35.150(b) (transition plan); 35.105 (self-evaluation); 35.160 and Pt. 35, App. A (effective communications; primary consideration be given to disabled individual's requested accommodation). Moreover, the court is entitled to give some guidance to the Board and set some deadlines for compliance. By her injunction, the thorough and extremely patient district judge did not attempt to "micro manage" the Board's activities, but rather to set clear objectives for it to attempt to attain, and, in most circumstances, general methods whereby it would attain them.[33]

[13] Finally, although the Board complains that the new policies impose unspecified financial and administrative burdens, we note that some such burdens are shared by all state agencies required to implement the ADA and Rehabilitation Acts. Aside from this general, but unfounded, concern, the Board has apparently experienced no burdensome interference with its parole and parole revocation process. In short, there is nothing to suggest that the injunction is unworkable: indeed, the Board appears to have found the new policies and procedures perfectly workable. Accordingly, we hold that the relief granted was appropriate and that the court order complied with the PLRA.

D. Propriety of Injunction

On appeal, the Board asserts three principal objections to the propriety of the district court's injunction: that the Board has

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33. The injunction does not, for example, prescribe which Department or Board officials or employees may be delegated the function of determining when hearing impaired prisoners or parolees who must use sign language to communicate may be shackled at the hearing.

provided a legitimate penological justification for its actions (or inactions) under *Turner v. Safley*, 482 U.S. 78 (1987); that many of the claims against the Board were resolved in the settlement agreement between plaintiffs and the Department; and that Governor Davis and Secretary Presley are not properly subject to the injunction. We address each in turn.

1. *Turner v. Safley*

Turner holds that "when a prison regulation impinges upon inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." 482 U.S. at 89. Here, we are presented with policies and regulations of a state parole board which apply both to the inmates inside the prison and the parolees on the outside. While we have not yet considered whether Turner is limited to the prison context or whether it also applies to matters affecting parolees, certainly many of the reasons justifying prison authorities overriding prisoners rights disappear outside the prison walls.[34] *See Felce v. Fiedler*, 974 F.2d 1484, 1495-1496 (7th Cir. 1992). However, we need not decide that issue for purposes of this appeal.

Assuming, without deciding, that *Turner* applies to all aspects of the case before us, we are required to determine whether there is a "valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it." *Turner*, 482 U.S. at 90. The Board has, however, repeatedly failed to adduce any justification, rational or not, for its ADA policy. For starters, it presents no justification that we can discern in its briefs. Equally surprising, the Board admitted at oral argument that we would find none in the record: it argued that such omission was immaterial so long as, even at

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34. For example, many of the security interests relevant to the operation of a prison which provided *Turner*'s justification for abrogating prisoners' rights are absent in the context of the supervision of parolees' activities.

that late stage of proceedings," we can come up with any reason in our heads" that would justify its policies.[35]

To satisfy *Turner*, the Board must, at the very least, adduce some penological reason for its policy at the relevant stage of the judicial proceedings. "Considerations advanced to support a restrictive policy [must] be . . . sufficiently articulated to permit meaningful . . . review." *Walker v. Sumner*, 917 F.2d 382, 386 (9th Cir. 1990). Thus, at a minimum, the reasons must be urged in the district court. While the Board is correct that the burden rests with the plaintiff to refute the Board's defense that its actions were penologically justified, *see Frost v. Symington*, 197 F.3d 348, 357 (9th Cir. 1999), that defense must at the very least be raised. Here, at oral argument, the Board for the first time referred obtusely to something about "cost" and "administrative "concerns without any explanation whatsoever as to how or in what respect the injunction implicated these matters. Certainly, it did not suggest that the unspecified costs and administrative concerns were any greater than those of any other agency subject to the ADA, or offer any reason why it should be exempted from the ordinary costs and burdens of complying with the ADA. We agree with the Seventh Circuit that prison authorities "cannot avoid court scrutiny [under *Turner*] by reflexive, rote assertions." *Shimer v. Washington*, 100 F.3d 506, 510 (7th Cir. 1996). In this case, the Board's unusual contentions did not even rise to that level, *see* n. 35, *supra*. In short, the Board has failed totally to establish that the injunctive order in any way conflicts with *Turner*.

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35. The Board suggested that the absence of penological justifications in the record was due to its being silenced on this point by the district court. This assertion appears to be a fabrication. We find no evidence to support it in the record and the Board has identified none. Nor can we accept the remarkable proposition that the Board advanced at oral argument: that there were just too many justifications for it to include any particular ones.

2. Control Over Department

The Board next argues that the injunction applies to parts of the original litigation already resolved by the settlement agreement, and is directed at facilities and individuals that are under the control of the Department. This objection does not properly apply to the parole revocation notification and hearing process. Prior to the hearing, the parolees are not incarcerated in facilities controlled by the Department, and notices may be served by any qualified persons designated by the Board. Moreover, parole revocation hearings need not be conducted at Department facilities. Because the Board can conduct the parole revocation process without using Department personnel or premises, the Board could readily comply with this aspect of the injunction without involving the Department's staff or facilities in any way.

The case of prisoners (and parolees whose parole has already been revoked) is different, however. The Department may in some instances require the Board to utilize Department staff or facilities when serving notice or conducting hearings on Department premises. We have identified three aspects of the injunction that must be construed or modified in a manner that will ensure that it does not order the Department to further modify its facilities, policies, or procedures,[36] or direct the Board to require the Department to do so (even assuming the Board had such authority).

a. Department Facilities

Paragraph 6 of the injunction, which requires the Board to develop a transition plan in accordance with 28 C.F.R. § 25.150(d), mandates that the Board evaluate facilities in which parole proceedings are conducted; provide the Department of

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36. As a result of the policies and practices developed in response to the settlement agreement, the Department is, apparently, already in substantial compliance with the ADA.

Corrections with a list of all facilities that are not fully accessible; and produce a schedule for providing accessible proceedings for prisoners with disabilities at each facility. While most of paragraph 6 is unobjectionable, and simply requires the Board to inform itself as to which facilities, including Department facilities, provide accessible hearing rooms for mobility impaired prisoners or parolees, to the extent that it requires mobility impaired prisoners housed in Department facilities to be transported to alternative, accessible hearing locations, paragraph 6 may interfere with the Department's penological interest in securely confining certain prisoners. Accordingly, we construe this provision as requiring only that the Board request that the Department transport mobility impaired prisoners to accessible locations if the facilities at which they are housed are inadequate. The Department may, for valid security or other penological reasons, decline to do so.[37]

b. Training of Department Personnel

Paragraph 14 of the injunction requires the Board to provide ADA training to its own staff, any attorneys it employs, and Department staff involved in the parole and parole revocation process. This portion of the injunction is designed to enforce 28 C.F.R. § 35.130(b)(1), which prohibits state entities from avoiding compliance with the act by delegating their services "through contractual, licensing, or other agreements." To the extent that paragraph 14 directs the Board to require Department personnel to undergo training, we agree with the Board's objection. Accordingly, we instruct the district court to modify the injunction as follows on remand: The Board shall provide training for all persons under its jurisdiction to the

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37. We note that, under the policies developed as a result of the settlement agreement with the Department, mobility impaired prisoners are to be grouped at accessible facilities. Thus, there may in any event be no practical problem with respect to offering all mobility impaired prisoners hearings at accessible facilities.

extent set forth in paragraph 14; it shall also offer training to Department staff involved in the parole and revocation process; should any Department personnel decline such training, the Board shall use its own personnel in their stead, except when the Department requires that Department employees perform the services involved.

c. Tracking System

Paragraphs 15-18 of the injunction require that the Board establish a tracking system by which it can determine which inmates suffer from disabilities, and what their disabilities are.[38] The Board relies upon a prior decision of ours in the Department phase of this case, *see Armstrong v. Davis*, 215 F.3d 1332, 2000 WL 369622 (9th Cir. 2000), in asserting that no tracking system is required. However, in our earlier opinion we did not reject the tracking requirement *per se*, but held that the tracking system proposed by the Department was "reasonably related to legitimate penological interests," and should not have been rejected by the district court. *See id.* Because the regulations implementing the ADA require a public entity to accommodate individuals it has identified as disabled, 28 C.F.R. § 35.104, some form of tracking system is necessary in order to enable the Board to comply with the Act. However, to the extent that tracking is conducted by the Department, it is not necessary for the Board to duplicate that system, and the Board may make use of the Department's tracking system as a permissible means of complying with the injunction.

3. Davis and Presley

Governor Davis and Secretary Presley contend that they are not properly part of this portion of the lawsuit and that plaintiffs

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38. The Board argues that the tracking system requires it to discover non-apparent disabilities possessed by disabled prisoners or parolees. It does not. It simply requires the Board, once it becomes aware of such non-apparent disabilities, to keep track of them.

are barred from proceeding against them here by virtue of the settlement agreement entered into by the plaintiffs and the Department. A settlement is interpreted as any other contract, under the interpretive rules of the state. *Gates v. Rowland*, 39 F.3d 1439, 1444 (9th Cir. 1994). The first step in contractual interpretation in California is to examine the text, Cal. Civil Code § 1638, and determine the intent of the parties. Cal. Civil Code § 1636. Here, the Governor and the Secretary rely on two parts of the settlement agreement. First, they point to the text, which states that: "This settlement does not resolve any issues between plaintiffs and the Board of Prison Terms or defendant Nielsen" Second, they rely on the inclusion in the settlement agreement of their names among the Department defendants. The two provisions on which they rely do not show that the agreement was intended to release Davis and Presley from the Board's portion of the case. The purpose of the provision of the settlement agreement quoted above was to make it clear that none of the issues regarding the *Board's* operations were to be affected by the *Department's* agreement. The fact is that the settlement agreement did resolve *some* issues involving Davis and Presley, because they, unlike Nielsen, have supervisory authority over the Department. Thus, it would have been erroneous to include their names in the quoted provision of the settlement agreement. As to the inclusion of Davis' and Presley's names on the list of Department defendants, their names were included because the two state officials have supervisory authority over the Department, and to the extent the claims against the Department were resolved, so were the claims against them. The claims against the Board were not resolved, however, nor were the claims against Davis or Presley that were based on their supervision of the Board. It is significant in this regard that there is no language in the settlement agreement providing that the Governor and the Secretary shall be dismissed as parties, or that all claims against them would be resolved by the agreement.

The simple fact is that the settlement agreement resolved only a portion of the issues between the plaintiffs and Davis and

Presley, the two state officers who have jurisdiction over both the Department and the Board. While it might have been preferable to include a sentence stating explicitly that the Governor and the Secretary remain defendants in the instant portion of the lawsuit, such language was not essential. Thus, Davis and Presley properly remain parties to the litigation between the plaintiffs and the Board.

E. Sovereign Immunity

The defendants have not raised the issue of sovereign immunity in this case. Accordingly, any defendants to whom sovereign immunity might apply have waived that affirmative defense. Waiver of the sovereign immunity defense must typically be "stated by the most express language or by such overwhelming implication" that the state's intent to waive is unambiguous. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239-40 (1985). Thus, mere appearance to defend a lawsuit will not act as a waiver, but "conduct during the litigation [that] clearly manifests acceptance of the federal court's jurisdiction or is otherwise incompatible with an assertion of Eleventh Amendment immunity" will be construed as a waiver. *Hill v. Blind Indus. & Servs. of Md.*, 179 F.3d 754, 759 (1999), amended by 201 F.3d 1186 (9th Cir. 2000).[39] This is so because Eleventh Amendment immunity has traditionally been characterized as a "personal privilege which [the state] may waive at [its] pleasure," *Clark v. Barnard*, 108 U.S. 436, 447 (1883), and although in the nature of a jurisdictional bar, it does

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[39] *See also Torres v. Puerto Rico Tourism Co.*, 175 F.3d 1, 5 (1st Cir. 1999) (defendant's failure to argue that a statute is an invalid abrogation of sovereign immunity until its reply brief on appeal is a waiver of that defense); *Garrity v. Sununu*, 752 F.2d 727, 731 (1st Cir. 1984) (holding that a defendant's full acquiescence with a district court injunction and its failure to contest it on the merits on appeal is a waiver of a sovereign immunity defense in the appeal of fee awards); *New York State Ass'n for Retarded Children v. Carey*, 596 F.2d 27, 39 (2d Cir. 1979) (participation in a consent decree waives a sovereign immunity defense on an appeal contesting the district court's interpretation of that judgment).

not actually "implicate a federal court's subject matter jurisdiction in any ordinary sense" and thus may be "forfeited by the State's failure to assert it." *ITSI TV Prods., Inc. v. Agricultural Ass'ns*, 3 F.3d 1289, 1291 (9th Cir. 1993); *see also Wisc. Dep't of Corrs. v. Schacht*, 524 U.S. 381, 389 (1998) ("The State can waive the defense. Nor need a court raise the defect on its own. Unless the State raises the matter, a court can ignore it.").

In *Hill,* we held that by actively litigating its case on the merits throughout the pre-trial period and waiting until the opening day of trial to assert a sovereign immunity defense, the state had waived that defense. 179 F.3d at 763. Here, the defendants engaged in litigation conduct far more extensive than that of the defendant in *Hill*. The defendants did not assert sovereign immunity as a defense to this lawsuit in either of their amended answers, in the joint pretrial statement, in any pre-trial motions, at trial, or in the briefs on appeal.[40/] Instead, they argued to the district court that their policies complied with the ADA, and on appeal that any violations of the ADA do not justify the relief granted.[41/] Indeed, even though the defendants

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40. In their answer to the original complaint, defendants asserted that they "have immunity guaranteed by the Constitution or Laws of the United States." However, in the subsequent answers to the amended complaints, and in the pretrial motion, this assertion is no longer made and there is no mention of any immunity defense. "[A]n amended pleading supersedes the original." *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1546 (9th Cir. 1989) (citations omitted); *accord Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992). This rules applies as much to amended answers as to amended complaints. *See Goldstone v. Payne*, 94 F.2d 855, 856 (2d Cir. 1938); *see also District of Columbia, Dept. of Public Works v. L.G. Industries, Inc.*, 758 A.2d 950, 957 n. 6 (D.C. 2000).

41. The Board contended at oral argument that it had somehow raised a sovereign immunity defense in the motion for summary judgment filed pursuant to the settlement agreement between the Department and the plaintiffs. However, the Board was not a party to either the settlement agreement or the motions filed pursuant to that agreement, and cannot rely upon either as raising that defense.

did not mention a sovereign immunity defense in their briefs, this court twice asked them to submit a letter brief about the effect of the Supreme Court's recent decision in *Board of Trs. of the Univ. of Ala. v. Garrett*, 121 S. Ct. (2001), on this case, but they declined to do so.[42] Consequently, the defense is waived.

Additionally, it is undisputed that the Rehabilitation Act applies in this case: the acceptance of federal funds upon which the applicability of the Rehabilitation Act is conditioned serves to waive sovereign immunity with respect to the claims that arise under that Act. *See* 42 U.S.C. § 2000d-7; *Jim C. v. United States*, 235 F.3d 1079, 1082 (8th Cir. 2000) (en banc) (holding that accepting funds pursuant to § 2000d-7 is a valid waiver of sovereign immunity); *see also generally College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686-87 (1999) ("Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions."). As we have noted (see n. 17 *supra* at p. 16075-76), the claims in this case are identical under the Rehabilitation

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42. The state declined because, although "the California Governor's office and high ranking state officials have engaged, and they will continue to engage, in consideration of the legal positions they may want to pursue regarding [Garrett] [a] full consideration of this matter has been impossible because these officials have been immersed in matters related to California's current energy crisis." Shortly before the argument, we once again requested the state to advise us of its position regarding Garrett or the status of its efforts to determine its position. The state responded that "the state officials with whom the Attorney General's office would need to consult on these issues have been devoting their time and resources to negotiations with the investor-based utilities [involved in California's energy crisis]." At oral argument, in response to a direct inquiry from the panel, the state continued to equivocate. We find this course of action bizarre and inexcusable. We do so without even considering the other activities the Governor was busily engaged in during the time in question. We also observe that it is now more than seven months since the date of oral argument and the state has still not accepted our invitation.

Act and the ADA. Thus, the injunction would withstand a defense of sovereign immunity even if a suit against the Board under the ADA were barred.

Furthermore, *Garrett* makes clear that there is another, independent basis for the implementation of the injunction: there is no barrier to the injunction against Nielsen in his official capacity as Secretary of the Board. *Garrett*, explicitly stated that "[o]ur holding here . . . does not mean that persons with disabilities have no federal recourse against discrimination. Title I of the ADA still prescribes standards applicable to the States. Those standards can be enforced by . . . private individuals in actions for injunctive relief under *Ex parte Young*, 209 U.S. 123 (1908)." 121 S. Ct. at 968, n. 9. Because the injunction requires Secretary Nielsen to comply with its provisions, it would remain in force even if relief could not be ordered against the Board, and its effect would, for all practical purposes be the same. For the reasons set forth above, the state is not immune from suit. Morever, the injunction would be effective as to Secretary Nielsen in any event.

III. CONCLUSION

There is no dispute that the Board repeatedly violated the ADA and the Rehabilitation Act, and it is evident that the violations were system-wide. Plaintiffs have standing to seek a remedy for those violations. In most respects, the class-certification was appropriate. However, if plaintiffs seek to include, within the class, sexually violent predators, mentally disordered offenders, and prisoners or parolees with renal impairments, named plaintiffs must be added to represent those groups. Otherwise, the district court must modify the certification order and the injunction accordingly. We interpret paragraphs 6 and 15-18 of the injunction as permitting the Department to object, for valid penological reasons, to the transportation of prisoners (including those facing parole revocation extension hearings) to alternative facilities, and as permitting the Board to use the Department's tracking system to

comply with the injunction. We order that paragraph 14 be modified to the extent that it requires the Board to exercise control over Department personnel, and direct the district court to do so on remand. In all other respects the injunction is proper and its scope appropriate. It does not violate the provisions of the PLRA and is not inconsistent with *Turner v. Safley*. Sovereign immunity does not bar this action, and Governor Davis and Secretary Presley properly remain as defendants.

AFFIRMED IN PART, VACATED IN PART, AND REVERSED AND REMANDED IN PART

BERZON, Circuit Judge, concurring:

I fully concur in the opinion, but write separately about two related matters. First, the standing issue in this case is, I believe, somewhat more straightforward than the court's opinion may suggest. Second, it is useful to compare this case directly to *Lewis v. Casey*, 518 U.S. 343 (1996), the Supreme Court's most recent major pronouncement on the issuance of injunctions in prison cases. Doing so demonstrates that the injunction in this case suffers none of the standing or other defects that led the Court in Lewis to preclude equitable relief. Because the two points inform one another, I will discuss them together.

Standing is a jurisdictional issue. The court therefore must address standing, where questionable, even if the parties do not raise it. *See, e.g., Juidice v. Vail*, 430 U.S. 327, 331 (1977). Here, the Bureau of Prison Terms and its Chairman (BPT) did raise a standing issue, but on much more limited bases than the court's comprehensive discussion may suggest. I mention that not because I think the court is wrong to do a thorough job, but because the fact that the BPT, in its very complete presentations, did not raise at all some of the concerns the court discusses suggests that, as the court ultimately concludes, there is no merit to them.

I therefore find it helpful to begin the standing inquiry with the question the court addresses last but upon which the BPT concentrated in its rather brief presentations -- namely, whether the individual named plaintiffs suffered an actual injury. If they did, then under *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037 (9th Cir. 1999) (en banc), there is an Article III "case or controversy," and the question becomes whether the named plaintiffs have made a showing of a "real or immediate threat that the plaintiffs will be wronged again" adequate to maintain a claim for equitable relief. *Id.* at 1042, quoting *Los Angeles v. Lyons*, 461 U.S. 95, 111, (1983).

The BPT maintains -- fairly cursorily -- that some of the named plaintiffs suffered no "legal injury", by which I presume BPT means that they suffered no Article III injury. Otherwise, the argument could not matter for standing purposes. One contention is that several of the named plaintiffs suffered no such injury because they never asked for an accommodation. But the question whether the provisions of Title II of the ADA assuring disabled individuals equal access to public programs are limited to those who request accommodation is a merits question, not one that affects whether the plaintiffs have suffered an injury *in fact*.

The BPT also suggests at points that the named plaintiffs lack standing because they cannot show that the result of their parole proceedings would have been different had they been accommodated. A similar inquiry was central in *Lewis*, because *Lewis* involved a *constitutional* challenge based on a right of access to the courts. Given the basis for the lawsuit, the Court in *Lewis* concluded that only inmates who could demonstrate that the prison's failure to provide *some* means of accessing courts deprived them of the ability to litigate an arguable claim could show an actual injury. *Id.*, at 351-353.

Here, however, the named plaintiffs are pursuing a statutorily-protected interest in *equal* access with other prisoners and parolees to parole-related BPT proceedings -- a dignitary

interest, so to speak. Further, the statute under which they are suing specifically protects disabled individuals' "participation" in "programs" of a public entity. Plaintiffs are alleging, in other words, that the ADA protects the right of disabled but otherwise "qualified" individuals to participate in their own parole hearings whether or not the result is affected, just as the same statute protects the right of disabled but otherwise "qualified" professional golfers to participate in tournaments even if they come in last and don't win a penny. *See PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001).

Another BPT contention is that because the California Department of Corrections (CDC) entered into a settlement with the plaintiff class regarding its own ADA violations, the plaintiffs have no continuing "legal injury" with regard to matters within the BPT's bailiwick that might be remedied by the CDC plan. There is, however, nothing in the present record regarding any actual relevant change of conditions due to the CDC plan. The matter is therefore more properly addressed, as the court addresses it, by adjusting the scope of relief to cover only the BPT's involvement.

The BPT's fourth standing challenge concerns only the plaintiffs who were involved in parole revocation proceedings. BPT analogizes the plaintiffs' situation to that of ordinary citizens who seek to contest governmental conduct that *might* ensue *if* the plaintiffs break the law in the future, as in *Lyons* and *O'Shea v. Littleton*, 414 U.S. 488, 499, 38 (1974). BPT argues that the parolee plaintiffs in this case cannot allege a credible threat of future injury sufficient to sustain a claim to equitable relief, because the possibility that they will participate in future parole revocation hearings depends on too many contingencies.

The court addresses that contention convincingly, showing that:

(1) Most importantly, many of the plaintiffs had already been subjected to multiple parole revocation proceedings, *compare Hodgers-Durgin*, 199 F.3d at 1045 (citizens stopped repeatedly by Border Patrol agents should be able to demonstrate the requisite likelihood of future injury, although plaintiffs stopped once in ten years could not).

(2) There are various critical differences between the situation of individuals subject to parole supervision and ordinary citizens as regards the likelihood of future involvement in liberty-threatening proceedings. These differences include the fact of mandatory, ongoing interactions with law enforcement officials, the fact that parole can be and often is revoked for reasons other than violations of criminal laws, and the absence of any probable cause requirement preceding a parole revocation hearing.

(3) There would be no further contingencies if plaintiffs were again threatened with parole revocation, because the absence of accommodation was established BPT policy.

Interestingly, *Lewis*, while expressing great concern to assure that only inmates who had suffered actual injury could obtain injunctive relief, appeared willing to assume the likelihood of future injury from actual injury in the past where the affected plaintiffs and class members remained within the corrections system and subject to its rules, regulations, and facilities. The Court did not ask whether the illiterate plaintiff who had his court case dismissed with prejudice because he had no assistance in bringing it was likely to have a claim dismissed again in the future for that reason. Instead, the Court held only that "the remedy must . . . be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Id.* at 357.

For all these reasons, the named plaintiffs in this case, like the two plaintiffs in *Hodgers-Durgin*, demonstrated that they have Article III standing to pursue this litigation. The questions

then become (1) whether they have also established entitlement to equitable relief; and (2) if so, whether the scope of the relief granted is commensurate with the showing of injury suffered by the class.

It is critical to this case, in my view, that these two inquiries are not the same. While the prevalence of similar injuries among members of the class who are not named plaintiffs is not relevant to the first inquiry, *see Hodgers-Durgin*, 199 F.3d at 1045, the circumstances of class members are relevant to -- indeed, of enormous importance to -- the second inquiry, namely, the appropriate *scope* of any injunctive relief, as *Lewis* indicates. *See* 518 U.S. at 359-60 (looking at all the state's prison facilities and at class members who were not named plaintiffs before concluding that there were only two instances in which an illiterate inmate was unable to file a claim because he did not have assistance); *id.* at 360 n. 7 ("[o]ur holding regarding the inappropriateness of systemwide relief for illiterate inmates does not rest upon the application of standing rules, but rather . . . upon the respondents' failure to prove that denials of access to illiterate prisoners pervade the State's prison system.")[1] This consideration of class members' circumstances once standing and entitlement to equitable relief by named plaintiffs is established is commensurate with the general rule that once a court properly certifies a class action, "the unnamed persons described in the certification acquire[]a legal status

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1. The Court goes on in the same footnote quoted in the text to say that "The issue of systemwide relief has nothing to do with the law governing class actions." *Lewis*, 518 U.S. at 360 n. 7. I take this statement to mean that the mere *existence* of a certified class covering prisoners throughout the system is not itself enough to justify systemwide relief. Rather, it is necessary to demonstrate that class members were injured in various institutions and with regard to the particular matters covered before a broad systemwide injunction is justified. Still, without the class, the individual plaintiffs would presumably be entitled only to injunctive relief regarding their personal situations, so the class does matter to that degree, as the consideration in the body of the *Lewis* opinion of the circumstances of non-named plaintiffs demonstrates.

separate from the interest asserted by the appellant." *Sosna v. Iowa*, 419 U.S. 393, 393 (1975); *see also Gerstein v. Pugh*, 420 U.S. 103, 110 n. 11, (1975)[2]; *United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980).

As to the inquiry whether the named plaintiffs here have established their own entitlement to equitable relief, the circumstances surveyed above with respect to those plaintiffs' Article III standing are determinative: The life prisoners have a likely recurring injury, because they may well have repeated parole suitability hearings and the record establishes that the BPT had an ongoing policy of not providing for the full participation of inmates with the named plaintiffs' communication, mental, and mobility disabilities. The parolees, for the reasons already discussed, are more in the situation of the inmates in *Lewis* than the free-roving citizens in *Hodgers-Durgin*, as they remain subject to the direct supervision and intervention of the criminal justice system even if they do not break any criminal laws. They therefore have a likelihood of recurring exposure to parole hearings, and to the BPT's legally deficient policies regarding their participation in those hearings.

Turning to the second question -- whether systemwide relief was merited -- it is here that the contrast with *Lewis* becomes most stark. The ADA, as noted, protects against exclusion from participation. In this case, therefore, unlike *Lewis*, it suffices that such denial of participation exists for each category of disability represented by the named plaintiffs as well

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2. *Gerstein* is particularly informative here, as it involved a challenge regarding pretrial detention hearings, somewhat similar in their function and time-span to parole revocation hearings. The court noted that even though the named plaintiffs were no longer in custody at the time the class was certified, "in this case the constant existence of a class of persons suffering the deprivation is certain," and, given the short-lived nature of any particular defendant's claim to an adequate hearing, "[t]he claim . . . is one that is distinctly 'capable of repetition, yet evading review.'" 420 U.S. 103 at 111. The Court therefore allowed the case to go forward on a class basis, taking into account the separate interests of the members of the class.

as geographically across the system. Whether or not there are inmates of each category throughout the system whose ability to attain or stay on parole was affected as a result does not matter. *Compare Lewis*, 518 U.S. 350 ("The foregoing analysis would not be pertinent here if, as respondents seem to assume, the right at issue -- the right to which the actual or threatened harm must pertain -- was the right to a law library or to legal assistance.") The plaintiffs have made this showing, through extensive individual and expert testimony, and, critically, *the BPT does not now challenge* as unsupported by the evidence any of the findings of the court regarding particular examples of ADA violations or the pervasiveness of its ADA violations throughout the system.

The BPT comes at the contention that the named plaintiffs should not have been permitted to attain relief directed at the class's injuries in another way as well, maintaining that the named plaintiffs should be allowed to represent only classes with their *particular* disabilities, and then only with regard to the type of hearing to which they were exposed. But there is no reason that a plaintiff cannot be typical -- or present common issues -- with regard to *both* the class of disability they have and the type of hearing they have experienced, independently.

Moreover, how a class is properly defined depends largely on the claim they seek to adjudicate. Here, the contention is that the BPT had a consistent policy of precluding meaningful participation in hearings for disabled prisoners and parolees generally, and for the particular classes of disabled prisoners and parolees represented by the named plaintiffs specifically. There are only so many forms of interaction between the prisoners and parolees and the BPT -- written, oral, and physical. Whether a particular plaintiff has dyslexia or another learning disability does not matter with regard to whether the BPT has in place means of accommodating prisoners or parolees who cannot read. In *Lewis*, for example, the Court treated two illiterate inmates as raising a common issue concerning adequate legal assistance without considering *why*

each inmate could not read.[3/] Similarly, whether a particular plaintiff is a paraplegic or has multiple sclerosis does not matter with respect to whether the BPT improperly conducts hearings in places inaccessible to mobility-impaired individuals.

If the challenge were to a discrete BPT policy of refusing to accommodate only certain disabilities within the groups of disabilities included in the certified class, the Bureau might have a point, but that is not the case. Similarly, if there were some asserted conflict or diversity of interests between discrete subgroups of disabled inmates or parolees relating to the causes of action asserted, the BPT might have a point, but that is not the case either.

There is one final comparison with *Lewis* that is worth making and that the court makes: The process the district court used here for devising a suitable remedial plan is precisely the kind of process *Lewis* indicates is appropriate. The court in this case issued essentially an umbrella injunction, setting forth the general areas -- training, identification and accommodation, forms, equipment, the screening process, appeals, monitoring -- that the BPT needed to address, and directing *the BPT* to develop specific policies and procedures for complying with the ADA. In accord with a directed negotiation process included in the injunction, the BPT has apparently responded to the plaintiffs' objections to their proposed plans satisfactorily to the plaintiffs, and a plan was achieved without further court intervention. The BPT has no problem with the practicalities of the plan, and intends to abide by it even if the injunction is vacated.

As the court reports, then, this was a minimally intrusive, not an "inordinately -- indeed, wildly -- intrusive" injunction (*Lewis*, 518 U.S. at 362). It gave the major role in determining the new procedures to be put in place "to the views of state prison authorities." *Id.* It also bears noting, in light of any

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3. The Court went on for separate reasons to deny equitable relief.

separation of powers concerns, that this injunction remedied a federal *statutory* violation. The court therefore had considerable guidance from Congress and from the federal executive branch in devising appropriate relief. Further, the court today has scrutinized the injunction carefully and, as noted, adjusted it with regard to the few instances in which it appears to impose unworkable burdens on the BPT.

For all these reasons, this case and *Lewis* are antipods and the injunction in this case, as modified, was fully appropriate.[4/]

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4. I should note that I regard the question whether Governor Davis and Secretary Presley remain proper parties after the stipulation as closer than the court's opinion suggests. I nonetheless do not dissent from that holding because (1) there is in the "Stipulation . . . for Procedures to Determine Liability" no express release from liability, for the Governor and Secretary or anyone else; and (2) I cannot see why the two officials' presence or absence matters, as full relief can be obtained against the BPT and its Chairman, and the Governor and Secretary would have a duty as the Chairman's supervisors to see that he complies with any order against him.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOHN ARMSTRONG, et al., NO. C 94-02307 CW

Plaintiffs, FINDINGS OF FACT AND CONCLUSIONS OF LAW

v.

GRAY DAVIS, et al.,

Defendants.

_____/

INTRODUCTION

Plaintiffs, a class consisting of all present and future sight, California State prisoners and parolees with mobility, hearing, learning and developmental disabilities,[1/] allege in this action that they are subject to discrimination based on disability, and denial of due process, during proceedings conducted by Defendant California Board of Prison Terms (BPT). Plaintiffs therefore allege violations of Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12131 et seq., Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and the Due Process Clause of the Fourteenth Amendment. Defendants are Governor Gray Davis, Secretary of the California Youth and Corrections Agency (YACA) Robert

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1. The Plaintiff class was certified by order of the Court on January 13, 1995, and amended by orders of the Court dated December 24, 1998, and January 5 and January 13, 1999.

Presley, Chairman of the Board of Prison Terms James Nielsen, and the BPT.

Plaintiffs also asserted similar causes of action under the ADA and Section 504 against the State officials responsible for the California State Department of Corrections (CDC). The portion of the case against the CDC Defendants proceeded separately from the case against the BPT Defendants. The issue of the CDC Defendants' liability was resolved on September 20, 1996, when the Court found, based on a stipulated order entered on July 9, 1996, that the CDC Defendants had violated the ADA and Section 504. See Armstrong v. Wilson, 942 F. Supp. 1252 (N.D. Cal. 1996), aff'd 124 F.3d 1019 (9th Cir. 1997), cert, denied, 118 S. Ct. 2340 (1998). The Court approved the CDC's Remedial Plan on November 30, 1998.

The Court stayed the case against the BPT Defendants pending appeal to the Ninth Circuit of the Court's September 20, 1996 order. The parties subsequently agreed to extend the stay until the Supreme Court decided Pennsylvania Department of Corrections v. Yeskey, 524 U.S. 206 (1998). After the Supreme Court decided Yeskey, in which it held, as had this Court, that the ADA applies to State prisoners, discovery in this case was reopened.

A ten day bench trial in this action was held from April 20,1999 to May 13, 1999. Plaintiffs presented the direct testimony of five expert witnesses and two parolees, and 326 pages of declaration testimony from the five expert witnesses. In addition, Plaintiffs submitted 172 documentary exhibits and the deposition testimony of twenty-one prisoners, twenty-eight BPT employees and sixty-seven CDC employees. Defendants presented direct testimony and twenty-five pages of declaration testimony from one expert witness. Defendants also presented the direct testimony of one prisoner, six BPT officials, two of whom conduct hearings on a regular basis, and Defendant James Nielsen. Finally, Defendants submitted seven documentary exhibits.

SUMMARY

Plaintiffs have presented overwhelming and uncontradicted evidence that the BPT regularly, consistently and as a matter of routine practice fails to make its programs, services and activities accessible to members of the Plaintiff class. Its failure to do so discriminates against the Plaintiff class in violation of the ADA and Section 504 and, in many cases, violates the right of class members to due process. In essence, the BPT does little, and in many cases nothing, to ensure that prisoners with disabilities have physical access to the facilities in which proceedings are held, that they understand the proceedings and that they have a fair opportunity to defend themselves or otherwise argue that they should be granted or remain on parole.

Defendants did not contest that Plaintiffs or members of the Plaintiff class were disabled or that they were qualified individuals with disabilities. Defendants' percipient witnesses did not contradict any of the specific instances of discrimination submitted by Plaintiffs. Defendants' expert's opinions, with the exception of his unsupported conclusion that Defendants were in substantial compliance with the law, were largely consistent with those of Plaintiffs' experts.

Defendants have presented no defense except to argue that they are in substantial compliance with the statutes and the Constitution. Even if substantial compliance were a defense, which it is not, the facts do not come close to supporting this theory. This is not a case where the Court has any difficulty weighing the evidence to determine which party should prevail. Plaintiffs' evidence establishes conclusively that currently:

The BPT policies and procedures are insufficient to identify and provide accommodations to members of the Plaintiff class when necessary and appropriate;

the BPT does not provide accessible facilities to class members;

the BPT does not know which modifications or auxiliary aids and services are appropriate to ensure access to their programs or to ensure that class members understand the proceedings;

the BPT does not have the equipment to accommodate some class members;

the BPT failed to take the first step toward compliance by conducting an adequate self-evaluation of its programs and facilities to identify potential barriers;

the BPT relies extensively on complex and highly technical written forms to communicate with class members with cognitive disabilities;

the BPT accepts waivers of rights from developmentally disabled and learning disabled prisoners without any assurance that they understand the rights they are giving up or the consequences of their actions; and

although many class members cannot read printed documents because of their disabilities, the BPT does not provide any written material in alternative formats.

Perhaps most disturbing of all is that the facts and conclusions summarized above, which have been available to Defendants throughout discovery and during the trial, have evoked no response from the BPT, or its Chairman. With one minor exception, the BPT Defendants have not given any indication that they understand the nature or gravity of the problems. Indeed, they affirmatively deny that any problem exists even when such facts are brought to their attention.

Many of the constitutional and statutory violations found here are not subtle. Some prisoners who use wheelchairs have had to crawl up stairs to get to their hearings; mentally retarded prisoners who cannot even spell their names have waived their

right to a hearing and spent years in prison without the benefit of any assistance; a blind witness was denied access to information at his hearings because he could not see the documents; and hearing impaired prisoners who normally express themselves by using sign language had their hands shackled at their hearings, making such communication impossible.

The Court was shocked to find that these things occurred with such frequency. More shocking, however, was the level of indifference to the basic rights of prisoners with these disabilities that the BPT Defendants exhibited. The Court has no confidence that the BPT Defendants can cure or even recognize the statutory and constitutional deficiencies that are described herein.

Moreover, the BPT Defendants did not give the Court any indication that they intend to find solutions to the serious problems shown by the evidence presented at trial. To the contrary, they repeated blamed other agencies, or the prisoners or parolees themselves, for the BPT's violations, and claimed to have no control over the agencies to which they had delegated many of their responsibilities.

Nor did BPT officials take steps to investigate or remedy problems when they were brought to their attention. Thus, as the Court previously stated, the fact that the "parade of horribles . . . seems to have caused relatively little concern or investigation or remedy, makes it all the more shocking and appalling." RT at 1529:9-16.

Having considered the witnesses' testimony, documents admitted into evidence and the entire record of the case, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The Court begins, in Part I of the Findings of Fact, with findings about Plaintiffs and their disabilities. Next, in Part II of the Findings of Fact, the Court makes findings about Defendants and provides an overview of the BPT's policies and procedures that are at issue in this case. In Part III of the Findings of Fact, the Court makes findings about the effects of those policies and procedures on prisoners and parolees with disabilities.

I. Plaintiffs

Plaintiffs, and the class they represent, have various mobility, sight, hearing, learning and developmental impairments that substantially limit their mobility, vision, hearing, adaptive functioning and ability to learn and communicate. See Robertson Dec. ¶¶ 73, 79, 86, 92; Tr. Exs. P-251, 252, 271 (mobility impairments); Martinez Dec. ¶¶ 1, 32, 40-41, 53-54; Tr. Exs. P-224, 230, 231, 236, 242 (vision impairments); Strong Dec. ¶¶ 5-8, 42, 44, 45, 58, 65, 67, 69, 79; Tr. Exs. P-201-03, 209 (hearing impairments); Cowardin Dec. ¶¶ 28, 42, 96-191, Tr. Exs. P-112, 126, 127, 143, 144, 146, 164, 190, 199 (learning impairments), 52-63, 206-298; Tr. Exs. P-112, 117, 118, 122, 131, 135, 137 (developmental impairments); Derning Dec. ¶¶ 65, 77-85, 91, 97-98, 123-25, 135-143, 152-160, 168-169; Tr. Exs. P-117-19, 122, 123, 131, 134-35, 137, 140 (developmental impairments)[2/]

[2.] The Court accepted testimony from five expert witnesses offered by Plaintiffs (Peter Robertson; Nancy Cowardin, Ph. D.; Dr. Michael Strong; Timothy J. Derning, Ph. D.; and Kathleen Martinez) and one expert witness offered by Defendants (Michael Paravagna). At trial, Defendants challenged the qualifications of only one of Plaintiffs' experts, Nancy Cowardin. RT at 45:16-46:5, 171:20-172:9. Defendants argued that Dr. Cowardin was not qualified to offer expert testimony based on her analysis of the of various educational tests. Id. However, Dr. Cowardin testified that, as part of her doctoral program, she administered educational and developmental tests under the supervision of several faculty advisors and that she took several

A. Mobility Impairments

Disabilities affecting mobility may prevent persons from obtaining physical access to, or use of, buildings, sites, or other facilities. Robertson Dec. ¶¶ 13, 76, 127-28. The inability to gain physical access to a site may diminish a person's ability to participate in a vocational or educational programs. Id. ¶ 128.

Necessary accommodations for individuals with disabilities may not be obvious, or commonly understood by those without a disability. RT at 1464:6-17 (Paravagna). For example, even a small lip on the floor at the entrance of a room may prevent a wheelchair user from entering the room. Id.; Robertson Dec. ¶ 139.

Accessibility standards, guidelines and codes, such as the Uniform Federal Accessibility Standards, 41 C.F.R. part 101-19.6, App. A, and the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities, 28 C.F.R. part 36, App. A, describe specifications for elements in buildings to make them accessible to mobility impaired persons. Robertson Dec. ¶ 13. When buildings do not satisfy these standards, individuals with mobility impairments will be unable to enter, or will have difficulty using, those portions of the buildings. Id.

B. Vision Impairments

The term "vision impaired" includes people who are totally blind and those who are legally blind, along with people whose vision may be better than 20/200 (the threshold for legal

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courses in which she studied testing methodology, the analysis of test results and statistics. Id. at 39:16-40:19. The Court finds that each of the witnesses offered as experts, including Dr. Cowardin, was qualified to offer expert testimony within the meaning of Rule 702 of the Federal Rules of Civil Procedure, Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993), and Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).

blindness), but who cannot read normal size printed material. Martinez Dec. ¶ 1. Although in many cases, persons with vision impairments are readily recognizable, either based on written documentation of their disabilities or because they are physically recognizable as vision impaired, in other cases, it may not be readily, apparent that a person is vision impaired. RT at 566:12-16 (Martinez).

Vision impaired persons cannot read documents, notices or forms without assistance. Vision impaired individuals can be accommodated by being given forms and documents in alternative formats, such as Braille, large print or audio tape. Martinez Dec. ¶¶ 36-37; RT at 535:18-536:3 (Martinez). Audio tape is a particularly inexpensive, easy way to provide access to standardized information. RT at 535:21-536:3 (Martinez). Providing human readers may also be an effective accommodation. However, reading aloud takes twice as long as reading silently, RT at 532:21-23 (Martinez), and reliance solely on human readers thus may not be practical. RT at 532:3-7 (Martinez); Martinez Dec. ¶¶ 36-37. In addition, if readers are to be used effectively, they must receive training about how to analyze a document, describe its layout and ensure that the structure and context of the document is clear to the vision impaired individual. Martinez Dec. ¶¶ 64-65. Absent training and sufficient time to read, readers may not fully accommodate vision impaired individuals, by failing to convey fully, or by skipping over, the information contained in a document. Martinez Dec. ¶¶ 37, 64, 66; RT at 558:24-559:12 (Martinez).

Identifying the most appropriate accommodation for a vision impaired individual is not necessarily straightforward. Martinez Dec. ¶ 64. To select and use appropriate means of communication with vision impaired individuals requires training about the need of the visually impaired, what type of assistance is most effective in various situations and how to provide such assistance. RT at 535:2-535:15 (Martinez).

C. Hearing Impairments

Whether individuals are considered hearing impaired or deaf depends on their level of residual hearing, which may range from slight impairment to total hearing loss. Strong Dec. ¶¶ 5-8. Throughout this order, the Court uses the term "hearing impaired"and "deaf" interchangeably.

Hearing loss may include an inability to understand loud sounds, or sounds in noisy environments, as well as difficulty hearing quiet sounds. Id. ¶ 30. It is estimated that 1.1 percent of the population has bilateral hearing loss, such that those individuals cannot hear or understand normal speech. When milder forms of hearing loss are included, it is estimated that eight and one-half percent of the general population, and up to thirty percent of the prison population, is hearing impaired. Id. ¶ 34.

Because hearing impairment is not visible, it may be difficult to identify hearing impaired persons. Id. ¶ 9. In addition many hearing impaired individuals develop coping strategies, such as lip reading, or nodding to indicate that they are paying attention, to mask their lack of hearing. Id. ¶ 9, 32. Such masking behavior often leads hearing people mistakenly to assume that the hearing impaired person understands what is being said. Id.; RT at 602:23-603:12 (Strong). Communication with persons who are impaired is often difficult, and the difficulty may be exacerbated by misconceptions about hearing impairment or deafness. Id. 10.

There are four main ways of communicating with hearing impaired individuals: hearing aids, signing, lip reading, writing. Id. ¶¶ 19, 23. Each method has benefits and disadvantages, and may be more or less appropriate, or effective, depending on the individual and the situation. Id. ¶¶ 24-28.

Hearing aids may improve an individual's ability to hear sound, but do not fully restore hearing, and may be rendered

ineffective by background noise or poor acoustics. Id. ¶¶ 19, 31. Although people may attempt to accommodate hearing impaired individuals by speaking louder, this may distort hearing for individuals who use a hearing aid. RT at 599:ll-600:18 (Strong).

Manual forms of language, such as American Sign Language and Pidgin Sign English, usually allow for accurate communication if both parties can sign, or if a competent interpreter is available. Id. ¶¶ 15-17, 23-24 . Only about twenty-five percent of hearing impaired individuals are able to sign, however, and using unqualified interpreters may hinder communication. Id. ¶¶ 26, 29. The effectiveness of using sign language is also compromised if a hearing impaired person is prevented from using his or her arms, because that person cannot converse with the interpreter. Id. ¶ 68; RT at 612:25-613:4 (Strong).

Communication by lip reading usually is possible only with persons with some residual hearing, who are skilled at lip reading, and have good language comprehension. Id. ¶¶ 23-24.

Lip reading is an inexact method of communication, however, and, at best, conveys no more than sixty percent of the information being communicated. Id. ¶¶ 29, 56; RT at 606:ll-607:9 (Strong). Lip reading is ineffective when multiple people are communicating. RT at 607:13-608:8 (Strong).

Written language is another means of communicating with hearing impaired individuals. Id. ¶ 23. However, written language is not necessarily effective, especially with severely hearing impaired individuals, who often do not read or comprehend documents well. Id. ¶¶ 12-13, 24, 33; RT at 600:9-18, 607:13-608:8 (Strong). English often is not the first language of individuals with hearing impairments, and those who do learn English often have limited reading abilities. RT at 597:14-17, 602:16-25 (Strong); Strong Dec. ¶¶ 12, 33. Even deaf persons who have graduated from high school have, on

average, only a fourth grade reading level. Strong Dec. ¶ 22; RT at 601:14-25 (Strong); RT at 1464:6-17 (Paravagna) (indicating that deaf person may be able to sign but not read). Thus, written language generally is an inadequate means of communication with hearing impaired persons and should be used only as a last resort. Strong Dec. ¶ 60; RT at 614:3, 622:16-24 (Strong).

The identification of an effective means of communication with a hearing impaired person often is not a matter of common sense. RT at 604:10-605:9 (Strong). To select and use appropriate means of communication requires training about the communication needs of the hearing impaired, how to use sign language interpreters and how to confirm that a hearing impaired individual understands a communication. Id. ¶¶ 84, 85, 95; RT at 599:11-600:18, 603:20-605:5 (Strong); Paravagna Dep. at 90:19-91:12.

D. Learning and Developmental Disabilities

1. Learning Disabilities

A learning disability is a cognitive disorder that affects the ability of persons with normal intellect to learn academic and social information. Cowardin Dec. ¶ 28. Learning disabled individuals have an impaired ability to understand or use written or spoken words, which may be manifested as an imperfect ability to listen, think, speak, read, write, spell or do mathematical calculations. Id.; RT at 73:6-25, 74:18-75:2 (Cowardin). Studies indicate that the learning disabled are over-represented in the criminal justice system. Id. ¶¶ 306, 307. The CDC estimates that eleven percent of its wards under age twenty-one are learning disabled, compared to the estimated five percent of youth in public schools who have one or more learning disabilities. Id. ¶ 308.

Learning disabilities are readily diagnosed through standardized testing, by comparing an individual's intellectual ability, as measured by a standardized test, with his or her

academic functioning, as measured by achievement tests in reading, mathematics and written language. Cowardin Dec. ¶ 30.

Learning disabilities interfere with an individual's ability to perceive, discriminate, intake, store, process and/or express academic and social information. Id. ¶ 40. As a result, individuals with learning disabilities may find it difficult to understand basic information that they hear, see or read in print. Id. ¶¶ 40-43. Academic deficits, intellectual deficits and developmental lags, language and processing deficits, adaptive skill deficits, social/behavioral deficits and attention deficits are commonly observed in individuals with learning disabilities. Id.

Learning disabled individuals often have trouble interpreting written symbols, and many are functionally illiterate. Id. ¶¶ 314; RT at 52:16-53:44, 55:25-56:7, 59:6-11, 159:12-160:4 (Cowardin). Thus, learning disabled individuals may not be able to read, understand or follow directions contained in written notices. Id. Similarly, learning disabled individuals who have difficulty processing auditory information cannot, quickly comprehend verbal information delivered without accompanying gestural cues, id. ¶ 321, and may not understand information through verbal communications, especially if it involves complex phrasing or vocabulary, jargon or abbreviations. Id.

2. Developmental Disabilities

Developmental disabilities are substantial disabilities that originate before an individual attains age eighteen and continue, or can be expected to continue, indefinitely; the term developmental disability includes mental retardation, cerebral palsy, epilepsy and autism, as well as disabling conditions that are closely related to mental retardation. Derning Dec. ¶ 36; Cal. Welf. & Inst. Code § 4512(a). Other disabling conditions "that are solely physical in nature" are not considered developmental disabilities. Id.

Developmentally disabled individuals have significantly sub average intellectual functioning, with severe deficits in adaptive functioning. Cowardin Dec. ¶¶ 55-56. This reduced functioning interferes with their ability to understand what is being communicated, to express thoughts or ideas and to read or comprehend written material. RT at 55:3-21 (Cowardin); RT at 177:14-178:1 (Derning); Cowardin Dec. ¶¶ 61-62, 323.

Mental retardation is defined as significantly sub-average intellectual functioning that coincides with major deficits in at least two areas of adaptive functioning, and that begins during the developmental period. Derning Dec. ¶ 37. There are four levels of mental retardation, which reflect varying levels of intellectual impairment: mild, moderate, severe and profound. Derning Dec. ¶ 41. There are no precise criteria to define which disabling conditions are sufficiently "closely related to mental retardation"to constitute developmental disabilities, and individuals with such conditions may be referred to as "borderline" mentally retarded. Id. ¶ 37.

Approximately two to ten percent of the general prison population fits the diagnostic criteria for mental retardation; the CDC estimates that developmentally disabled individuals comprise five to seven percent of the prison population. Tr. Ex. P-92 at Clark 14; see also Cowardin Dec. ¶ 311. Individuals with mild mental retardation comprise eighty-five percent of all people with mental retardation, and are most likely to be represented in the prison population. Id. ¶ 41.

All forms of mental retardation represent severe impairments, however, and involve intellectual functioning below approximately ninety-seven percent of the general population. Id. ¶ 49. Even mild mental retardation represents a severe cognitive disability that may affect all aspects of an individual's adaptive functioning and development, including intellectual, cognitive, language, psychological, social, emotional and moral development. Id. ¶¶ 28, 32, 39. Because the intellectual and cognitive deficits associated with mental

retardation occur early in development, most areas of mentally retarded individual's development are permanently affected, delayed or both. Id. Because of their deficits in adaptive functioning, individuals with mental retardation require support to function at a level equivalent to that of their peers of average intelligence, id. ¶ 42, especially with tasks that require the use of reasoning skills or that involve weighing different options. Id. ¶ 56; see also id. ¶¶ 178-79.

A common misunderstanding about mental retardation is that a mentally retarded person can easily be identified by non-clinicians in the course of casual observation. Id. ¶ 48. However, outside of a clinical setting, many individuals with mental retardation are not easily identifiable to the casual observer as being mentally retarded. Id. ¶¶ 48- 49. In addition, individuals with mental retardation often seek to hide their disabilities, and may appear more knowledgeable and competent than they are. Id. ¶ 50. Even those who acknowledge their disability often explain it as illiteracy, poor schooling, being "slow," or having poor memory, rather than as mental retardation. Id. For these reasons, many developmentally disabled inmates in the prison population may go unrecognized. RT at 184:1-23, 325:4-6, 327:25-331:15 (Derning); Cowardin Dec. ¶¶ 315-16, 347-49.

Individuals with mental retardation often are passive or dependent, and may easily acquiesce to authority. Id. ¶ 51. In addition, mentally retarded individuals tend to have concrete, literal styles of thinking, and often have difficulty processing new information, associating new information with previous knowledge, using abstractions or engaging in hypothetical reasoning. Id. ¶¶ 52-53. Accordingly, they tend to be poor problem solvers, and have considerable difficulty with tasks that require abstract reasoning, planning or hypothetical thinking. Id. Finally, people with mental retardation often demonstrate

poor judgment as a result of developmental immaturity, which may manifest as a tendency to oversimplify complex decisions, over-reliance on others to make decisions, and an inability to evaluate the implications of a decision. Id. ¶¶ 54-55.

3. Types of Accommodations for Learning and Developmentally Disabled Individuals

Methods of accommodating learning disabled and developmentally disabled persons include rewriting written forms, notices and other materials at lower reading and comprehension levels, as well as providing interpreters who are trained in simplifying written language and concepts to lower levels, and who can restate at a lower language level information that was presented orally. Cowardin Dec. ¶¶ 321, 328; RT at 53:8-14, 72:8-11, 73:20-25, 120:9-14 (Cowardin); Derning Dec. ¶¶ 183, 188.

II. Defendants

Defendant Board of Prison Terms is the agency charged with making parole determinations for prisoners and parolees in the California criminal justice system. The BPT is composed of nine Commissioners and approximately fifty Deputy Commissioners. The BPT is a sister agency to the CDC; both agencies report to the Secretary of the Youth and Adult Correctional Authority, Defendant Robert Presley. Defendant Presley, in turn, reports to Defendant Governor Gray Davis. The parties have stipulated that the Youth and Adult Correctional Authority receives federal financial assistance. RT at 872:10-18 (Prince). As discussed below, the BPT has delegated of its duties to the CDC. According to Chairman Nielsen's testimony at trial, this decision was made by officials at YACA. RT at 1037:17-1041:21 (Nielsen).

The BPT plays a vital role in California's criminal justice system. Specifically, the BPT determines whether parolees who

have violated the conditions of their parole should be returned to prison and whether, in such cases, parolees should be offered the chance to waive their right to a parole hearing in exchange for a specific prison term. Strong Dec. ¶ 37. Of the approximately 122,000 offenders who are sent to prison every year, more than half--65,000--are parolees sent by the BPT for violating the conditions of their parole. Martinez Dec., Ex. B. Each year, the BPT also determines whether approximately 20,000 prisoners sentenced to life terms should be released on parole, and determines whether prisoners should be involuntarily confined to mental institutions because they are sexually violent predators or mentally disordered offenders.

As discussed in detail below, the BPT makes its decisions concerning prisoners and parolees through administrative processes and hearings, and relies on extensive written communications, and some verbal interaction, to make these decisions.

A . Notices and Forms

The BPT relies on written notices and forms to communicate vital information about prisoners' and parolees' parole status, and the BPT's procedures, to those prisoners and parolees. RT at 62:7-13 (Cowardin); RT at 833:21-834:4 (Connolly).

The BPT serves a variety of forms on prisoners or parolees in the parole process. The forms that are served on prisoners or parolees prior to hearings include, but are not limited to: Life Prisoner Notice of Hearing Rights (Tr. Ex. P-156 at PVSP 4332, 4335); Life Prisoner: Request for Attorney, Waiver of Attorney, or Withdrawal of Request (Tr. Ex. P-156 at 4331); Life Prisoner Parole Consideration Hearing (Tr. Ex. P-156 at PVSP 4356); Notice of Right to [Revocation] Hearing Acknowledgment (Tr. Ex. P-52 at BPT 647); and Waiver of Revocation Hearing (Tr. Ex. P-143 at PC 479). See also RT at 1115:5-16 (Trott). To appeal an adverse decision by the BPT, a prisoner or parolee

must complete and file a Form 1040 appeal form. RT at 840:10-13 (Connolly).

As of February, 1998, in addition to the other forms that must be served on prisoners and parolees prior to BPT hearings, the BPT added the requirement that prisoners and parolees be served with the BPT Reasonable Accommodation Notice and Request Form (Form 1073). RT at 1148:13-23 (Trott). The Form 1073 is the form prisoners and parolees with disabilities must to use to request reasonable accommodations for a BPT hearing. Tr. Ex. P-56; Dunlap Dep. at 120:22-121:13. It is the sole notice prisoners and parolees receive of their rights under the Americans with Disabilities Act.

B. Supporting Documents and Prisoner Files

Prisoners and parolees are entitled to review written documentation contained in their central or medical files prior to parole revocation, parole revocation extension and parole consideration hearings, and may need access to their files in order to contest charges against them, advocate on their own behalf or provide verification of the disability to support a request for accommodation. See Tr. Ex. P-52 at BPT 647, 658; RT at 67:11-20, 142:4-12 (Cowardin); RT at 545:5-12 (Martinez).

For example, life prisoners facing parole consideration hearings are entitled to review their central file, CDC parole evaluation report, psychiatric evaluation report and notices of their rights at the hearing. Martinez Dec. ¶ 34; Nielsen 1996 Dep. at 25:9-12; see also Cal. Code Regs. Tit. 15, § 2265 et seq. Prisoners and parolees facing parole revocation or revocation extension proceedings are entitled to review the police report, parole violation report, notices of their rights, and forms that allow them to request an attorney and to present witnesses. Tr. Ex. P-52 at BPT 647-657; Martinez Dec. ¶ 34; RT at 1009:20-23 (Nielsen).

Prisoners and parolees filling out Form 1073 are required to provide verification of their disabilities, or to indicate where in their CDC files such verification is located, in order for the request made on the form to be granted. RT at 1397:6-11 (Dunlap); Dunlap Dep. at 79:16-80:21, 80:25-81:21.

C. Screening Offers

Prior to a parole revocation hearing, parolees who are alleged to have violated the conditions of their parole are presented with a "screening offer," a written offer to the prisoner or parolee for a specific sentence of up to twelve months, in exchange for the prisoner or parolee waiving the parole revocation hearing. Strong Dec. ¶ 37. The BPT presents approximately 75,000 screening offers per year. RT at 829:4-12 (Connolly). Although there is no statutory requirement that the BPT do so, the BPT has delegated to the CDC the responsibility of presenting screening offers to prisoners and parolees. CDC officials, called District Hearing Agents or Hearing Agents, serve the papers on the prisoners and parolees, pursuant to the authority of the BPT. RT at 1037:17-1039:6 (Nielsen)

Once the BPT decides to charge a prisoner or parolee with a parole violation, a CDC District Hearing Agent serves the prisoner or parolee with the written screening offer and supporting documentation, including the violation report, non-confidential portions of the police report, a Form 1073 and forms explaining the prisoner's or parolee's legal rights. RT at 1115:5-16; 1115:21-1116:9, 1145:9-16 (Trott); Strong Dec. ¶ 38; Tr. Ex. P-56; Tr. Ex D-1 at BPT 51. Unless the prisoner or parolee has spoken to his or her parole agent, the meeting with the Hearing Agent is the first time the parolee is informed of the charges against him or her. RT at 1114:21-1115:2 (Trott).

The Form 1073 is given to the prisoner or parolee at the time the screening offer is made; there is no formal procedure by which a prisoner or parolee can request an accommodation

prior to the screening offer process. Tr. Exs. D-1 at BPT 51, D-4 at BPT 173; RT at 1128:14-1129:1 (Trott); Strong Dec. ¶ 38.

At the time the screening offer is served on the prisoner or parolee, the District Hearing Agent briefly discusses with the prisoner or parolee his or her rights and options. RT at 1115:5-16, 1120:9-12 (Trott). Screening offers are sometimes served on prisoners and parolees in groups; if the offer is served in a group, however, a prisoner or parolee still has the opportunity to meet briefly with a District Hearing Agent. Id.

Meetings with Hearing Agents last approximately fifteen to twenty minutes, during which time the prisoner or parolee must make a complicated series of decisions, including whether to accept the screening offer or contest the charges, and if the prisoner or parolee decides to contest the charges, whether to request an attorney or interpreter, and whether to call witnesses at the hearing. RT at 57:22-58:14, 59:12-23, 147:22-148:13 (Cowardin); Cowardin Dec. ¶¶ 377, 379, 380; O'Bryan Dep. at 80:9-16; Strong Dec. ¶ 37; RT at 705:4-706:9 (Lambert); RT at 1117:3-1118:4 (Trott).

In addition, prisoners and parolees are not assigned counsel for the screening offer process. Instead, if the prisoner or parolee rejects the screening offer, and decides to proceed to a hearing, he or she must request an attorney at the time of the screening offer by completing an attorney request form. RT at 1270:17-23 (McNair); RT at 1117:12-1118:1 (Trott); Trott Dep., Valdivia v. Wilson, No. Civ. S-94-0671 LKK GGH (E.D. Cal.), at 111:15-21. The Hearing Agent then determines whether the prisoner or parolee will receive an assignment of counsel. RT at 1117:12-1118:1 (Trott). If an attorney is appointed at all, he or she is appointed only after the screening offer is complete. RT at 864:15-865:14 (Mincey); RT at 1270:13-1271:14 (McNair); O'Bryan Dep. at 306:21-307:10

D. Hearings

The BPT conducts approximately 30,000 to 35,000 hearings per year. RT at 1382:16-23 (Dunlap); RT at 829:1-12 (Connolly). It conducts the following hearings: (a) parole revocation and revocation extension hearings, (b) life prisoner hearings, (c) mentally disordered offender hearings and (d) sexually violent predator probable cause hearings. Tr. Exs. P-52 and D-1.

1. Parole Revocation and Revocation Extension Hearings

Parole revocation hearings are conducted to determine whether good cause exists to revoke a parolee's parole, and to determine for what amount of time a parolee should be returned to custody if good cause to revoke is found. Tr. Ex. P-52 at BPT 646. Parole revocation extension hearings are conducted to determine whether, based on a former parolee's conduct in prison subsequent to parole revocation, good cause exists to extend the period for which a former parolee has been returned to custody. Id. At the time of the screening offer meeting, prisoners and parolees may request that an attorney represent them at a parole revocation hearing or a revocation extension hearing. Tr. Ex. P-163 at PC 8492.

2. Life Prisoner Hearings

The phrase "life prisoner hearings" encompasses several different types of hearings: (a) documentation hearings, (b) initial and subsequent life prisoner parole consideration

hearings, (c) progress hearings, (d) parole date rescission hearings, (e) serious offender hearings[3] and (f) parole board rules hearings. Tr. Ex. D-1 at BPT 37-39.

Documentation hearings are held every three years until a life prisoner's initial parole consideration hearing, to ensure that a prisoner's file contains all relevant documents and records. RT at 893:8-25 (Beekman); Nielsen 1996 Dep. at 13:6-10; Strong Dec. ¶ 63; Tr. Ex. D-1 at BPT 44; *see also* Cal. Code Regs. Tit. 15, § 2269.1(b).

Initial and subsequent life prisoner parole consideration hearings are conducted to determine if the prisoner is suitable for parole and, if so, when he or she should be released. Nielsen 1996 Dep. at 11:10-14. These parole eligibility hearings are conducted before three BPT Commissioners or Deputy Commissioners. RT at 948:7-15 (Nielsen); RT at 60:23-24 (Cowardin). The hearing is conducted in three phases. RT at 61:8-62:6 (Cowardin); RT at 925:5-926:159 (Beekman). In the first phase, the commitment offense is reviewed. RT at 61:8-20 (Cowardin). In the second phase, the prisoner's participation in prison programs and his or her behavior while in prison is reviewed. RT at 61:21-62:1 (Cowardin). In the third phase, the prisoner's parole plans in the event of release are considered. RT at 62:2-6 (Cowardin).

Progress hearings are held to determine whether a prisoner's conduct in prison warrants post-conviction credit. Tr. Ex. D-1 at BPT 46. Parole date rescission hearings are held to determine whether there is good cause to rescind or postpone a life prisoner's parole date. Tr. Ex. D-1 at BPT 47. Serious

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[3] Serious offender hearings are not limited by statute to prisoners with life sentences. Cal. Penal Code §1170.2(b). However because serious offender hearings are only applicable to prisoners convicted of felonies committed prior to July 1, 1977, see Cal. Penal Code §1170.2, the passage of time has rendered serious offender hearings primarily applicable to life prisoners.

offender hearings are conducted to determine the term of confinement under the retroactive application of the determinate sentencing law. Tr. Ex. D-1 at BPT 47. Parole board rules hearings are conducted to determine parole dates for prisoners who committed their4 life-sentence crimes prior to July 1, 1977, and who have been found suitable for parole. Tr. Ex. D-1 at BPT 48; In re Stanworth, 33 Cal. 3d 176 (1982) (mandating use of parole board rules hearings for life prisoners convicted of crimes committed prior to July 1, 1977).

3. Mentally Disordered Offender and Sexually Violent Predator Probable Cause Hearings

Mentally disordered offender and sexually violent predator probable cause hearings are conducted to determine if a prisoner should be involuntarily committed to a psychiatric institution. The right to this hearing cannot be waived. Tr. Ex. D-1 at BPT 42-43; Beekman Dep. at 43:14-20.

4. Hearing Procedures

Hearings generally are conducted in facilities owned and operated by the CDC or the Department of Mental Health, or in County jails. Chairman Nielsen indicated that the BPT is not statutorily required to hold the hearings in these locations, but that it does so for several reasons. RT at 1032-35 (Nielsen). First, prisoners with life sentences may be dangerous, and, thus, it is easiest to hold their hearings at the facilities at which they are housed. Id. at 1033. Second, parole revocation hearings are required by law to be held as close as possible to the location at which the parole violation occurred, and the closest location usually is the County jail. Id. at 1034-35. Chairman Nielsen acknowledged, however, that he did not believe the BPT was precluded from establishing alternative hearing locations. Id. at 1035.

Prisoners and parolees are entitled to attorneys for some, but not all, hearings. Although a prisoner or parolee may request an attorney for a revocation or revocation extension hearing, whether one is provided is at the discretion of the BPT. Tr. Ex. P-163 at PC 8492. In contrast, prisoners are entitled to attorneys for some life prisoner hearings,[4] but may waive that right. For mentally disordered offender and sexually violent predator probable cause hearings, an attorney is appointed, and may not be waived. See RT at 927:8-10 (Beekman); RT at 841:1-5 (Connolly).

E. Appeals

The BPT makes approximately 300,000 appealable decisions annually. RT at 976:2-6 (Nielsen); RT at 1383:3-6 (Dunlap). In 1998, the appeals division of the BPT, which processes all appeals filed by prisoners and parolees, reviewed 8000 appeals. RT at 773:11-18, 785:18-21 (Connolly). Prisoners or parolees may appeal, virtually all adverse determinations by the BPT,[5] including the denial of a request for accommodations, by completing and filing a Form 1040. RT at 779:18-780:3 (Connolly). The BPT does not have a separate grievance procedure by which prisoners and parolees can request reconsideration of a denial of a request for accommodation or make known other ADA-related grievances. RT at 784:2-13 (Connolly).

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4. The BPT does not provide attorneys as a matter of right for documentation, progress and parole board rules hearings. Life prisoners are entitled to an attorney for initial and subsequent parole consideration hearings and parole date rescission hearings.

5. Decisions scheduling hearings are not appealable. RT at 774:15-20 (Connolly).

Appeals generally are based entirely on the prisoner or parolee's written objections to the decision, as presented on the Form 1040. Connolly Dep. at 88:20-89:12; Tr. Ex. P-86 at BPT 1335. The BPT rarely interviews a prisoner in connection with an appeal. RT at 852:20-25 (Connolly).

In addition, the prisoner or parolee must include every basis for the appeal of a particular decision in a single appeal. RT at 843:8-11 (Connolly). If a second appeal is filed based on the same proceeding as was involved in the previous appeal, the second appeal usually is summarily denied. Thus, prisoners who are denied accommodations for disabilities prior to a hearing must wait to appeal the denial of accommodation until after the hearing is completed or risk waiving claims that may arise from the conduct of the hearing itself. RT at 843:12-844:16, 1194:16-1195:1 (Connolly).

III. Effects of BPT Policies and Procedures on Class Members

A. Access to Facilities

The BPT is aware that prisoners and parolees with mobility impairments have had difficulty accessing hearing locations. For example, Associate Chief Deputy Commissioner Edward McNair stated that hearings had been discontinued at two BPT hearing locations in part because of accessibility concerns. RT at 1307:13-1310:24 (McNair). In addition, the BPT allowed hearings to continue for at least one year at a location that Plaintiffs' accessibility expert found completely inaccessible, while the BPT negotiated to secure another hearing room. RT at 1328:15-1333:18 (McNair); RT at 428:21-430:13 (Robertson).

However, the BPT has not conducted a survey of its hearing locations to determine if those locations are accessible to persons with disabilities. RT at 1414:18-1415:4 (Paravagna);

Paravagna Dep. at 49:1-50:4; RT at 981:20-982:3 (Nielsen); Nielsen 1999 Dep. at 24:23-25:19; Nielsen 1996 Dep. at 51:5-11, 53:20-25; Dunlap Dep. at 111:5-111:8.

BPT officials, commissioners, Deputy Commissioners and Associate Chief Deputy Commissioners do not know which hearing locations are accessible. RT at 1393:18-24 (Dunlap); Dunlap Dep. at 112:19-23, 116:9-20; Gillis Dep. at 121:18-122:5, 152:12-23; Koenig Dep. at 47:1-8; Bybee Dep. at 98:24-99:8; Beekman Dep. at 102:5-18; Bruce Dep. at 137:21-138:13; Connolly Dep. at 54:20-57:4. Neither do they know how inmates with mobility impairments, such as wheelchair users, obtain access to the hearing rooms, despite the fact that they acknowledge that the BPT is responsible for ensuring that hearings are held in accessible locations. Gillis Dep. at 121:18-122:5; Koenig Dep. at 47:1-8; Beekman Dep. at 102:5-18; Bruce Dep. at 137:21-138:13; Connolly Dep. at 53:18-25, 54:20-57:4; RT at 822:18-20 (Connolly); Robertson Dec. ¶¶ 44, 45; Richardson Dep. at 76:17-98:8. In this regard, BPT officials consistently testified that they would not know if a prisoner or parolee had difficulty accessing a hearing location because of a disability, unless the prisoner or parolee informed them of this fact. Koenig Dep. at 47:1-8; Bybee Dep. at 98:24-99:8; Bruce Dep. at 137:21-138:13.

The BPT's ADA Coordinator, Tina Dunlap, also did not know which hearing locations are accessible, nor did she know if anyone at the BPT knew that information. Dunlap Dep. at 112:19-23, 116:9-20. Ms. Dunlap was not aware of any BPT policies, procedures or practices relating to determining the accessibility of BPT hearing locations. Dunlap Dep. at 112:19-23.

Chairman Nielsen indicated that it is the BPT's current policy to postpone a hearing if a prisoner or parolee cannot access the hearing at the scheduled location. RT at 1000:18-1002:9, 1000:22-1002:9 (Nielsen). However, the BPT does not determine whether a hearing location is accessible prior to a

hearing. RT at 1000:7 (Nielsen). Chairman Nielsen indicated that it is the prisoner or parolee's responsibility to notify the BPT that a hearing location is inaccessible, and that the BPT did not identify whether a site is accessible prior to a hearing. RT at 1000:4 (Nielsen).

However, the BPT's ADA coordinator indicated that there was no policy or procedure by which a prisoner or parolee could identify in advance of the hearing whether a particular site is accessible, Dunlap Dep. at 114:7-11, 114:22-115:17; RT at 1393:18-24 (Dunlap), and that she did not know how a prisoner or parolee could ascertain that information in advance of a hearing. Dunlap Dep. at 114:22-115:17. Neither did Ms. Dunlap know of any occasion on which a hearing had been postponed in order to accommodate a disability. Dunlap Dep. at 147:5-10.

Moreover, the practice of postponing hearings, whether in advance of the hearing or at the time of the hearing when it becomes apparent that a mobility impaired prisoner cannot access the site, may, in turn, require that mobility impaired prisoners remain incarcerated for additional time merely because they were unable to access the hearing location. Id. RT at 1000:18-1002:9 (Nielsen).

Defendants indicated that the reason the BPT is unaware which of its hearing locations are accessible is that it has not surveyed those locations, because it does not own or operate the facilities in which hearings are held. RT at 981:14-19 (Nielsen); Nielsen 1999 Dep. at 17:5-11, 24:23-25:19; Gillis Dep. at 138:4-8; Robertson Dec. ¶ 38. However Chairman Nielsen conceded that the BPT is not statutorily required to hold its hearings at particular locations, and could hold hearings in alternative facilities. RT at 1059:10-13, 1034:2-7, 1035:3-8 (Nielsen).[6/]

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6. Defendants' expert, Mr. Paravagna, conceded that his opinion that the BPT was in compliance with the ADA might change if he learned

1. Los Angeles County Men's Jail and San Francisco Hall of Justice.

The BPT hearing locations at the Los Angeles County Men's Jail and the San Francisco Hall of Justice were undisputedly inaccessible for persons with disabilities.

On March 16, 1999, Plaintiffs' accessibility expert, Peter Robertson, inspected the Los Angeles County Men's Jail BPT hearing facilities (LA facilities). He recorded specific observations and measurements regarding accessibility with his tape measure, digital inclinometer (to measure the slope of ramps) and force gauge, and took photographs of certain locations and elements. Robertson Dec. ¶¶ 48-49. The LA facilities were found inaccessible in several significant respects: inaccessible paths of travel to the hearing rooms; inaccessible sanitary facilities; inaccessible water coolers; and an inaccessible entrance and exit to the facility. Robertson Dec. ¶¶ 50-54. Overall, it was undisputed that the LA facilities were inaccessible, with Plaintiffs' accessibility expert rating them an eight out of ten on a scale with ten being the least accessible. RT at 428:21-430:13 (Robertson).

On March 22, 1999, Mr. Robertson inspected the San Francisco Hall of Justice BPT hearing facilities (SF facilities). Again, he recorded specific observations and measurements regarding accessibility with his instruments, and took photographs. Robertson Dec. ¶¶ 55-56. The SF facilities contained numerous significant barriers to access, including barriers to accessibility and usability of ground transportation, paths of travel, holding cells, sanitary facilities, and entrances and exits to the facility and to the BPT hearing room itself. Robertson Dec. ¶¶ 57-65. Overall, it was undisputed that the SF

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that the BPT was not required to hold its hearings in facilities that it does not own or operate. RT at 1425:2-5 (Paravagna).

facilities were extremely inaccessible to persons with disabilities, with Plaintiffs' accessibility expert rating them a ten, the worst possible in terms of accessibility on a scale from one to ten. RT at 428:21-430:13 (Robertson).

Statistics and a chart of BPT hearing locations produced by Defendants indicated that the counties of the two hearing facilities inspected by Plaintiffs' accessibility expert process a significant number of prisoners and parolees from the California prison population. Robertson Dec. ¶¶ 69-70. It was undisputed that the barriers to accessibility in the LA and SF facilities have likely affected a significant number of class members participating in the BPT hearing process. Publicly operated facilities in major urban areas such as San Francisco and Los Angeles tend to present fewer inaccessibility problems than similar facilities operated by smaller municipalities. See id. ¶ 68. The inaccessibility of the SF and LA hearing locations raises an inference that there is a systemic problem, and that the BPT still needs to evaluate and determine the accessibility of all of its hearing locations. Id. ¶¶ 68-70.

2. Mobility Impaired Prisoners and Parolees

As a result of hearings being held in inaccessible locations, many prisoners and parolees with mobility impairments were unable to access their hearing locations, as required by the ADA. RT at 430:14-431:10 (Robertson); Robertson Dec. ¶¶ 71-106. Some examples follow.

a. Raymond Hayes

It was undisputed that Raymond Hayes has a mobility impairment, a paralyzed left leg and partially paralyzed right leg, that prevents him from climbing stairs. Tr. Ex. P-251 at SVSP 84, 88, 647, 661; Hayes Dep. at 9:24-10:22, 33:6-10; Robertson Dec. ¶ 73. It was also undisputed that, in spite of his disability, Mr. Hayes was forced to navigate a long flight of stairs by using his arms to drag himself from step to step,

injuring himself in the process, in order to access a hearing room for his 1994 parole consideration hearing with the BPT. Tr. Ex. P-251 at SVSP 935-938; Hayes Dep. at 34:1-5, 37:19-38:4; Robertson Dec. ¶ 74. Defendants also did not dispute that Mr. Hayes was forced to use his arms to drag himself up stairs for a 1992 parole consideration hearing, even after presenting a correctional officer with evidence from a doctor describing Mr. Hayes' inability to climb stairs. Hayes Dep. at 33:11-34:21; Robertson Dec. ¶ 75. Mr. Hayes was then forced to drag himself across a hearing room without the aid of his cane in order to access his chair. Hayes Dep. at 63:14-64:7; Robertson Dec. ¶ 76. Mr. Hayes waived his two subsequent parole consideration hearings with the BPT, in part so that he would not have to experience further failure by the BPT to accommodate his disability. Tr. Ex. P-251 at SVSP 950-51; Hayes Dep. at 32:10-15, 32:19-23, 41:11-16; Robertson Dec. ¶ 77.

b. Gene Horrocks

It was undisputed that Gene Horrocks is mobility impaired due to severe back problems and requires the use of a wheelchair to ambulate. Robertson Dec. ¶ 79; Tr. Ex. P-252 at ASP 13160, 13298, 13411, 13555, 16170, 16172, 16182, 16183, 16200, 16209; Horrocks Dep. at 8:16-10:1. In 1994, because there was no access to the second floor BPT hearing room, Mr. Horrocks had to be carried up the stairs in order to attend his parole consideration hearing. Tr. Ex. P-252 at asp 13536-38; Horrocks Dep. at 13:25-14:4; Robertson Dec. ¶ 80. It was undisputed that, in 1995, Mr. Horrocks' friends were not allowed to carry him up the stairs to a second floor BPT hearing room; Mr. Horrocks was instead required to negotiate the stairs on his own, which he did by facing backwards and dragging himself up from step to step. Tr. Ex. P-252 at ASP 13527-33, 13535; Horrocks Dep. at 15:3-20; Robertson Dec. ¶ 81. It was further undisputed that Mr. Horrocks experienced difficulty maneuvering his wheelchair along the paths of travel to the hearing room for a 1998 parole consideration hearing and, after

the hearing, Mr. Horrocks was denied ground transportation back to his holding cell and had to wheel his way back along a hilly paved road that was not accessible for wheelchair use. Tr. Ex. P-252 at ASP 13520-25; Horrocks Dep. at 16:25-17:13, 19:2-9; Robertson Dec. ¶¶ 82-84.

c. Robert Johnson

Robert Johnson is a paraplegic who requires the use of a wheelchair and catheter. R. Johnson Dep. at 25:22-25, 26:7-10, 26:15-18, 37:10-14, 39:1-9, 78:19-79:5; Robertson Dec. ¶¶ 92-93. It was undisputed that Mr. Johnson was forced to "crawl" into a van to be transported to his BPT hearing because the van was not equipped with a wheelchair lift. Mr. Johnson Dep. at 28:13-29:1, 29:18-20, 73:15-24, 78:3-18; Robertson Dec. ¶ 95. It was also undisputed that, while waiting for his 1995 BPT hearing, Mr. Johnson was handcuffed to his wheelchair in such a way that he was denied access to food and water, his medications and his catheter for most of the day, in spite of his repeated requests at the hearing for accommodation and his request to a screening officer prior to the hearing for accommodation for his mobility impairment. R. Johnson Dep. at 73:25-74:22, 77:6-78:2, 79:20-80:3; Robertson Dec. ¶ 96. As a result of the BPT's failure to provide Mr. Johnson with access to his catheter, he suffered a bladder accident while waiting for transportation back to his holding cell and was not even able to clean himself up due to his handcuff restraints. R. Johnson Dep. at 74:5-9, 78:19-79:19, 79:20-80:3; Robertson Dec. ¶ 97. It was further undisputed that Mr. Johnson attempted to inform BPT Associate Chief Deputy Commissioner Richard Washington, who was presiding at the hearing, about his lack of accommodation, but Commissioner Washington ignored his request for accommodation. R. Johnson Dep. at 84:24-85:13; Robertson Dec. ¶ 98.

It is also undisputed that, while waiting for his 1997 and 1998 BPT hearings, Mr. Johnson was again denied access to water, medication and his catheter, despite his repeated requests

for accommodation. R. Johnson Dep. at 54:21-23, 55:15-19, 68:22-69:5, 37:10-40:10, 46:18-48:6, 44:15-45:3, 114:5-116:10; Robertson Dec. ¶¶ 99-104. He ultimately waived his 1997 hearing in an attempt to return to his holding cell, and not be further denied access to his medications and catheter. R. Johnson Dep. at 55:15-19; Robertson Dec. ¶ 101. It was also undisputed that Mr. Johnson again attempted to inform the Deputy Commissioner at his 1998 BPT hearing about the failure to provide him with accommodation for his disability, but the Deputy Commissioner took no action to accommodate Mr. Johnson. R. Johnson Dep. at 48:7-49:6; Robertson Dec. ¶ 105.

Like the inspections of the BPT's LA and SF facilities, the experiences of these mobility impaired inmates demonstrate the BPT's failure to provide access to hearings for parolees and prisoners with disabilities. They also confirm the need for the BPT to evaluate its other hearing locations to determine whether they are in compliance with accessibility standards and to take steps to remove or otherwise mitigate the barriers to accessibility at noncompliant locations. Defendants failed to present any evidence that subsequent remedial measures have corrected these problems.

B. Effective Communications

1. Notices and Forms

Both Plaintiffs and Defendants' experts testified that the ADA requires that forms--especially the Form 1073, which notifies prisoners and parolees of their rights under the ADA, and allows them to request assistance--be available in alternative formats, such as Braille, large print or audiotape. Paravagna Dep. at 56:14-22, 57:12-16; RT at 1453:3-8, 1454:23-1455:5 (Paravagna) ; RT at 530:18-23, 535:18-536:3 (Martinez); Martinez Dec. ¶ 27; Strong Dec. ¶ 13.

Nevertheless, it is undisputed that none of the BPT's forms, including the Form 1073, is available in alternative formats. RT

at 1082:13-17 (Richardson); RT at 840:10-17 (Connolly) (1040 appeal form not available in alternate formats); RT at 530:19-23 (Martinez); Martinez Dec. ¶ 27; Tr. Ex. P-56; Dunlap Dep. at 122:1-122:4; Nielsen 1996 Dep. at 33:11-20, 63:14-64:9; McNair Dep. at 88:25-89:4; Connolly Dep. at 66:22-67:3; Washington Dep. at 44:1. See also Gillis Dep. at 135:9-12; Jallins Dep. at 100:2-17; Bruce Dep. at 155:3-11.

Defendants further admit that all of the written notices to prisoners or parolees are written in standard print and are not available in alternative formats such as large print, Braille or audio tapes. RT at 840:9-841:4, 1218:10-1219:25 (Connolly); Connolly Dep. at 66:18-68:10; Dunlap Dep. at 122:1-4.

The failure to provide documents in alternative formats means that vision impaired prisoners often have to rely on untrained readers, such as other prisoners or staff, to read BPT forms to them and complete BPT forms on their behalf. RT at 531:2-15 (Martinez); Martinez Dec. ¶¶ 36-37, 56. Similarly, the only way for vision impaired persons to have access to notices is by having another individual read the documents to them. RT at 531:24-532:13 (Martinez); Martinez Dec. ¶ 36.

Disabled prisoners and parolees without vision impairments may also be unable to access the BPT's notices and forms because they are learning or developmentally disabled and illiterate, or unable to understand the content of the notices and forms without assistance. As Plaintiffs' expert Dr. Nancy Cowardin concluded, and Defendants did not dispute, BPT forms require 12.5 to 17.7 grade level reading skills, which are far above the reading level of an average reader, much less a learning or developmentally disabled inmate. Cowardin Dec. ¶¶ 331-37 (BPT forms required 12.5 to 17.7 grade level reading skills). Many of the BPT's written notices have reading indices at the high school or college level. RT at 59:6-11 (Cowardin); Cowardin Dec. ¶¶ 314 (generally), 327-28 (forms related to revocation hearings). The reading levels of these documents are sufficiently high that the majority of learning and

developmentally disabled prisoners and parolees cannot read or understand them without assistance. Cowardin Dec. ¶ 314; RT at 616:9-23 (Strong).

Accordingly, many inmates with learning and developmental disabilities are unable to understand the notices they are given and the forms they are required to sign, which substantially and materially affects their ability to participate in the hearing process. Cowardin Dec. ¶ 294; Derning Dec. ¶ 183.

The BPT does not have a policy that requires the translation of written information provided to learning disabled or developmentally disabled prisoners or parolees into language they can understand. See RT at 1042:20-19 (Nielsen). CDC Hearing Agents, who make BPT screening offers, are not required to read any of the written materials to the prisoner or parolee, nor are they required to provide a sign language interpreter to deaf inmates if they do read the materials to them. RT at 1138:13-19, 1139:11-15 (Trott). Defendants' expert, Michael Paravagna, agreed that the BPT should let prisoners know that if they need assistance with the Form 1073 process, assistance is available and that one form of assistance would be to provide the forms in alternative formats. RT at 1454:23-1455:5 (Paravagna).

a. Form 1073 (Request for Accommodation)

In order to complete the Form 1073 properly, prisoners and parolees are required to provide verification of their disability, or to indicate where in their CDC file such verification is located. RT at 1055:19-1057:9 (Nielsen). The request will be denied if the prisoner or parolee does not have verification and such verification is not contained within his CDC file. But the BPT's Chairman has "no knowledge" as to whether the facts of a prisoner's or parolee's disability would actually be contained in those files. RT at 1060:25-1061:4 (Nielsen). Moreover, there is no assurance that a District Hearing Agent will have access to a prisoner's or parolee's files at the time a Form 1073

request is made. RT at 1056:19-1057:9, 1058:24-1059:13 (Nielsen). Nevertheless, the BPT's ADA Coordinator requires some kind of verification of the prisoner's or parolee's disability; otherwise she denies the Form 1073 request. RT at 1397:6-11 (Dunlap). She relies on District Hearing Agents or parole agents to find the verification, and the only source they consult is the central file or field file, maintained by the CDC. RT at 1397:12-25 (Dunlap).

Even when the Form 1073 is completed correctly, the person reviewing the form must have sufficient training to understand it. For example, Associate Chief Deputy Commissioner McNair reviewed a Form 1073 that asked for an attorney based on Attention Deficit Hyperactivity Disorder (ADHD). Commissioner McNair did not know what ADHD is, nor did he consult with anyone to find out. RT at 1317:22-1321:19 (McNair); Tr. Ex. P-259. In this regard, Mr. Paravagna agreed that if the person reviewing an accommodation request does not have training in disabilities, it would undermine his opinion that the BPT is in substantial compliance with the ADA. RT at 1466:20-1467:3 (Paravagna).

In addition, BPT staff may interpret the requests on the Form 1073 too literally. For example, the BPT's ADA Coordinator denied a prisoner's request for accommodation because he listed his disability as "wheelchair," which the ADA Coordinator stated "didn't tell me much." RT at 1383:7-17 (Dunlap). Chairman Nielsen similarly indicated that the denial of accommodation may have been appropriate in that case. RT at 1028:25-1029:1 (Nielsen); Tr. Ex. P-254.

Finally, the BPT presented no evidence that it is evaluating the efficacy of the Form 1073 procedures that it has in place. The BPT's ADA Coordinator does not know whether the Form 1073 procedure has been evaluated, and, indeed, does not even know how an evaluation would be performed. RT at 1390:12-17 (Dunlap). The BPT has no policies or procedures to provide

assistance to disabled prisoners or parolees in filling out Form 1073.

b. Form 1040 (Appeals)

Prisoners are not notified of their right to file an appeal, and may not know the appeal process exists or how to use it. Martinez Dec. ¶ 79; Strong Dec. ¶ 83. Defendants offered testimony that prisoners are informed about their right to appeal, and the appeals process, because the notice of hearing rights form contains an explanation of the right to appeal, and because the regulations governing an appeal are available in the law library and on the Internet. RT at 778:19-779:1 (Connolly). However, neither the notice of hearing rights or the library resources are available in alternative formats, and no other formal procedure exists for informing prisoners of their right to appeal. Id.

Even if they can get the forms, prisoners with vision impairments cannot read the Form 1040, because the form itself is not available in alternative formats. Martinez Dec. ¶¶ 79-80; RT at 840:10-17 (Connolly); Chartrand Dep. at 37:13-37:21. Although the Form 1040 itself gives a prisoner or parolee notice of his or her rights on appeal, and explains the procedure for filing an appeal, RT at 779:16-780:2 (Connolly), the Form 1040 is written at a 17.7 grade level. Cowardin Dec. ¶ 331. Because inmates with learning or developmental disabilities are often illiterate, they often cannot understand or fill out the appeal forms. Cowardin Dec. ¶ 371; see also Derning Dec. ¶ 179. Nor would most deaf prisoners be able to understand the appeal forms. RT at 616:24-617:6 (Strong).

2. Supporting Documents and Prisoner Files

In addition to the need to read and complete BPT forms, prisoners and parolees may also need to access a variety of other

documents, including documents in their central files, in order to prepare for a hearing.

A variety of auxiliary devices are available to assist individuals with disabilities to communicate with others, including TTY telephones, telephone amplifiers, magnifiers and computerized reading machines. The BPT presented no evidence that it regularly makes such equipment available to assist prisoners or parolees in preparing for, or communicating at, BPT hearings. First, the BPT does not itself own any such assistive equipment, nor has it taken steps to obtain such equipment. Martinez Dec. ¶¶ 35-36; Strong Dec. ¶ 8; RT at 601:2-7 (Strong); Nielsen 1999 Dep. at 63:14-64:9 (BPT does not have any enlarging equipment or reading machines of its own); Gillis Dep. at 153:24-154:7. See also RT at 991:20-22 (Nielsen) (BPT has not requested any funds to purchase equipment for prisoners with disabilities.)

The BPT presented no evidence that it has policies or procedures to ensure that inmates received access to auxiliary aids or equipment, even where such equipment existed in the CDC facility in which the inmate was housed. RT at 610:11-611:8 (Strong); Gillis Dep. at 153:24-154:3 (not aware of any instances of the BPT providing visual equipment so that a prisoner can review his central file prior to a hearing); Bruce Dep. at 175:6-176:1 (aware of computerized reading machines but does not know if they are available to the BPT, and is not aware of any policy ensuring access to these machines); Chartrand Dept. at 15:19-16:13 (does not know which CDC institutions have enlarging equipment or reading machines); Gillis Dep. at 153:24-154:3 (not aware of assistive equipment for inmates with disabilities); Bybee Dep. at 136:1-7; Paravagna Dep. at 119:12; Hill Dep. at 45:11-13.

As a result, prisoners with vision impairments may be unable to review documents to prepare for hearings. Tr. Ex. P-224 at CMF 12058, 12060, 12065, 12551 (Clifton Feathers); Martinez Dec. ¶¶ 40 n.5, 50 (discussing Feathers' inability to

review his central file). Even when the BPT appears to recognize a vision impaired inmate's need for access to auxiliary aids or equipment, it may be inconsistent in allowing such access. Martinez Dec. ¶¶ 52-53; W. Johnson Dep. at 22:6-22:23, 43:14-44:2 (Willie Johnson, who has impaired vision, was granted access to enlarging equipment to review documents before a 1995 hearing, but denied such access in 1998). Those inmates who do not receive accommodation, or who seek help reading or interpreting BPT documents, must depend on their peers for assistance, Richardson Dep. at 35:13-36:12, 64:23-65:6, a practice which may force them to reveal personal information that may put them at risk of harm. Cowardin Dec. ¶¶ 318-19.

3. Screening Offers

The evidence that class members frequently and, in many cases, consistently did not understand the rights they were waiving in the screening process was largely undisputed and wholly unrebutted. One of Plaintiffs' experts explained, "Prisoners/parolees with Learning and Developmental Disabilities, many of whom are functionally illiterate, [cannot] provide knowing and intelligent waiver of their right to a BPT hearing [without assistance.]" Coward in Dec. ¶ 92. The BPT'S expert, Mr. Paravagna, acknowledged the importance of the screening process, but he specifically disclaimed any opinion about it. RT at 1435:6-14, 1456:22-1457:6 (Paravagna).[7] A CDC employee who works closely with District Hearing Agents confirmed the frequency of uninformed waivers: "I have no doubt in my mind that they really didn't know what they were signing, but they had to sign it anyway." O'Bryan Dep. at 113:18-20. As discussed in more detail later

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[7] Mr. Paravagna did confirm his deposition testimony, however, that prisoners with mental retardation should have assistance before they can waive their right to a revocation hearing. RT at 1459:5-11, 1460:21-15, 1461:5-12 (Paravagna).

in this order, Plaintiffs presented ample testimony regarding repeated instances in which class members signed waivers that they did not understand, either because the forms were never explained to them, or because the explanations given were inadequate.

Associate Chief Deputy Commissioner Connolly conceded at the trial that evidence that prisoners or parolees did not understand the waiver that they signed when presented with a screening offer might provide grounds from releasing them from the waiver, and providing them with a full revocation hearing. RT at 1213:11-1214:9 (Connolly).

4. Hearings

It is also clear BPT staff and other staff to whom the BPT delegated its authority often failed to communicate effectively with hearing impaired, vision impaired, developmentally disabled and learning disabled inmates at the BPT hearings themselves.

Although BPT hearings differ in subject matter and purpose, all involve complex communications between the BPT and the prisoner or parolee. See, e.g., RT at 50:10-17 (Cowardin) (parole revocation hearings); RT at 609:9-23, 636:25-637:9 (Strong) (parole revocation and consideration hearings). The language used at hearings is sophisticated, the sentence structure is complex and the participants often use legal terminology. RT at 50:18-23 (Cowardin) (parole revocation hearings); RT at 177:7-13 (Derning) (generally). The high level of language used during the hearings, the often confrontational nature of the proceedings, and, for some hearings, the number of participants all present obstacles to meaningful participation and effective communication by class members. See, e.g., RT at 68:15-69:9 (Cowardin) (parole revocation hearings).

BPT hearings may be highly emotional situations because a prisoner or parolee's liberty often depends on their outcome. RT at 609:9-23 (Strong) (parole revocation and consideration hearings); RT at 1019:13-18 (Nielsen). In addition, hearings may include discussions of events that have happened in the past, in some cases years prior to the hearing. RT at 609:9-23 (Strong) (parole consideration hearings). The fact that hearings involve complicated emotional issues may interfere with a disabled prisoner or parolee's ability to communicate. RT at 609:24-610:7 (Strong).

For a prisoner or parolee to participate meaningfully in BPT hearings, he or she must understand the nature of the proceedings and the evidence being presented. Strong Dec. ¶ 35. The confrontational nature of some types of hearings, such as parole revocation and revocation extension proceedings, requires that a prisoner or parolee be able to communicate sufficiently well to present his or her defense. RT at 55:3-21 (Cowardin). It is extremely difficult for an individual who has cognitive or communicative impairments to participate meaningfully in BPT hearings. RT at 50:18-23 (Cowardin) (parole revocation and revocation extension hearings); RT at 177:14-178:1 (Derning) (generally). It is impossible for mentally retarded prisoners or parolees adequately to represent themselves in the hearings without assistance. RT at 55: 3-21 (Cowardin) (parole revocation and revocation extension hearings); RT at 177:14-178:1 (Derning) (generally).

The BPT does not accommodate developmentally disabled prisoners and parolees by providing assistants trained in the translation of the high-level language that is commonly used at BPT hearings. See RT at 51:16-53:18 (Cowardin). BPT hearing officers make little effort to determine whether the prisoner or parolee can understand the proceedings. RT at 53:15-18 (Cowardin). Even where an attorney is appointed to assist a developmentally disabled inmate, the attorney has little time with the inmate and has no training in communicating with disabled individuals. RT at 51:16-52:6, 55:22-56:21

(Cowardin). Moreover, many or most developmentally disabled individuals are unwilling to call attention to their own disability and ask for help–rather, such individuals frequently attempt to hide their disability. RT at 54:3-18 (Cowardin).

Similarly, blind inmates and deaf inmates need assistance in order meaningfully to participate in hearings and in interpreting documents provided to them for the first time during a hearing, but such assistance is not provided by the BPT. BPT Commissioners frequently attempt to communicate with deaf prisoners and parolees at hearings by writing back and forth. RT at 613:5-614:2 (Strong); RT at 703:11-20 (Lambert); Strong Dec. ¶ 60. However, this method of communication is inadequate because deaf individuals often are unable to understand information received in this way. RT at 613:5-614:2 (Strong); RT at 703:11-20 (Lambert); Strong Dec. ¶ 60. In addition, deaf prisoners and parolees have been shackled at their hearings, thus preventing them from fully communicating in sign language. RT at 612:3-613:4 (Strong); RT at 713:15-714, 714:14-715:25 (Lambert); Strong Dec. ¶ 68. Defendants admitted that if shackling hindered a prisoner's ability to communicate, such conduct was improper. RT at 827:l-17 (Connolly); RT at1006:8-1007:25 (Nielsen). Defendants' expert also testified that such conduct was improper. RT at 1461:15-1462:23 (Paravagna).

District Hearing Agents and BPT Commissioners rely on their own abilities to assess whether prisoners or parolees understand the proceedings, determine whether a prisoner or parolee can communicate effectively, and decide whether a hearing must be postponed in order to obtain assistance for a prisoner or parolee. The BPT does not have a policy or systematic procedure to ensure that prisoners are provided with the necessary auxiliary aids and services so that they can communicate effectively. Strong Dec. ¶¶ 63, 64. Thus, whether a prisoner or parolee is able to understand, and participate meaningfully in, the hearing depends on individual Hearing Agents and Commissioners, and the needs and abilities of

individual prisoners and parolees. RT at 53:15-18, 54:3-7 (Cowardin); RT at 195:5-14 (Derning); RT at 609:1-611:8 (Strong); RT at 713:15-715:4, 734:15-17, 735:10-14, 736:2-10 (Lambert); Honore Dep. at 18:2-21, 30:16-31:5, 34:3-9.

5. Appeals

No policies or procedures exist for assisting prisoners with disabilities in appealing BPT actions. Chartrand Dep. at 37:6-37:21; Martinez Dec. ¶ 80; Strong Dec. ¶ 82. Among other things, this means that no assistance is provided to prisoners who wish to appeal denials of requests for accommodation of their disabilities. This may be why Associate Chief Deputy Commissioner Connolly, the head of the BPT's appeals division, does not recall ever drafting or reviewing any appeal response involving disabilities and is not aware of any modifications or accommodations requested by disabled prisoners or parolees in the appeals process. Connolly Dep. at 37:24-39: 10, 76:10-27.

The BPT places the burden of verifying and providing documentation of the disability on the prisoner or parolee. RT at 1056:5-18, 1057:3-7 (Nielsen). A mentally retarded inmate, for example, has to supply verification to get accommodations. Connolly Dep. at 102:8-102:18. Thus, even if learning and developmentally disabled prisoners were apprised of their right to appeal denials of accommodation, made aware of the appropriate form, given instruction on how to fill in the form and given assistance with actually filling in the form, their appeals would likely be denied because they usually do not have access to the documentation necessary to support their requests for accommodation. See Cowardin Dec. ¶ 372.

Attorneys are not appointed or reimbursed for appeals. Cowardin Dec. ¶ 369; Tr. Exs. P-86, 87. Prisoners and parolees must therefore draft and file appeals, whether they are appeals of the merits of a decision or of a denial of an accommodation, without the assistance of an attorney. Cowardin Dec. ¶ 369. Although the BPT asserts that

"prisoners/parolees may seek the assistance of staff or others when filing the appeals," without policies, training or notification of CDC staff who are to perform these duties, there are problems inherent in relying on them to perform this function. Martinez Dec. ¶¶ 75-77, 81. Requiring parolees to prevail upon CDC staff or other prisoners for assistance fails to ensure effective access to the appeal system; it also violates parolees' rights to privacy and raises the potential for abuse and extortion. Martinez Dec. ¶¶ 82-83.

6. BPT Accommodations Relative to Effective Communications

BPT officials repeatedly testified that the only accommodations provided by the BPT for prisoners or parolees with various disabilities were attorneys or sign language interpreters. Strong Dec. ¶ 61; McNair Dep. at 110:23-111:3, 60:14-22; Bruce Dep. at 118:21-25; Washington Dep. at 53:10-15. BPT officials seemed unaware of any other available assistive services or accommodations. Associate Chief Deputy Commissioner McNair, for example, testified that the only accommodation that he could think of to provide for an inmate with a mental disability was an attorney. McNair Dep. at 110:23-111:3. Chairman Nielsen did not know how to accommodate an inmate with a learning disability or even what a learning disability was. RT at 1018:3-22, 1014:23-1016:20 (Nielsen).

Although interpreters, attorneys and readers may be appropriate accommodations in some cases, these auxiliary aids are not appropriate in all situations, and, in many cases, may fail to provide the assistance needed for prisoners or parolees to understand, or participate in, the parole process.

a. Readers

Vision impaired prisoners and parolees may request readers to read their central files to them; however, many visually

impaired prisoners are unaware that they can request such assistance. Martinez Dec. ¶ 56; Feathers Dep. at 34:25-35:6, 35:18-24; RT at 530:17-23, (Martinez). Even when readers are made available, they provide only limited assistance. These readers provided by the BPT are not trained to communicate with the visually impaired. Martinez Dec. ¶ 65; RT at 531:21-23, 535:5-15 (Martinez). Without training, readers cannot necessarily effectively accommodate the visually impaired. Martinez Dec. ¶ 64 ; RT at 531:21-23 (Martinez). A reader may need to provide a simple analysis of the document, describe its layout and consult the individual on his or her preferred approach to reading it. Martinez Dec. ¶ 65.

Neither can the BPT rely on Hearing Agents to read documents to prisoners or parolees at the time of their hearings. Reading aloud takes approximately twice as long as reading silently, RT at 532:21-23 (Martinez), and Hearing Agents are able to spend only a limited amount of time with each individual. Garcia Valdivia Dep. at 14:13-15:12 (forty to fifty minutes collectively); O'Bryan Valdivia Dep. at 79:19-80:16 (average screening time is ten to twenty minutes). Even well-intentioned Hearing Agents may cursorily skim, summarize or interpret important documents if faced with the need to read those materials to a prisoner or parolee under such time constraints. Martinez Dec. ¶¶ 65-66.

Correctional counselors face similar time pressures, and often are not willing to spend time reading documents to inmates with disabilities, particularly absent a policy that requires them to do so. RT at 1059:18-20 (Nielsen). As a result, prisoners or parolees may be left without assistance to access their files in order to prepare for a hearing.

b. Sign Language Interpreters

For many deaf persons, sign language is a favored means of communicating with hearing persons. Strong Dec. ¶¶ 17, 29, 61. Thus, the appointment of a sign language interpreter can be

an effective accommodation for a deaf or hearing impaired inmate. But providing an interpreter is effective only if the hearing impaired inmate knows sign language, which many do not. Strong Dec. ¶¶ 17, 29, 61; Paravagna Dep. at 29:l-14. And, the inmate must be free to communicate with the interpreter.

Furthermore, the BPT often refuses sign language interpreters to the hearing impaired. Strong Dec. ¶ 42; Blessing Dep. at 20:17-21:2; 30:25-31:3; Tr. Ex. P-201 at PVSP 6621, 6625, 6629, 6635. In particular, the BPT often denies prisoners' requests for sign language interpreters at screening offers. Strong Dec. ¶ 46; Rose Dep. at 30:20-30:24; Blessing Dep. at 20:17-21:2; RT at 705:20-706:9 (Lambert); Lambert Dep. at 42:l-15; 59:17-59:20. The BPT also fails to provide consistently interpreters to hearing impaired inmates undergoing psychological evaluations prior to life prisoner parole consideration hearings. Tr. Ex. P-202 at PVSP-5990; Strong Dec. ¶¶ 65-66 (although deaf inmate Kevin Carle's file indicates he should be provided with an interpreter at his psychological evaluation, no such interpreter was provided); Tr. Exh. P-205 at 20 (no psychological evaluation of deaf inmate Elio Castro was conducted prior to his 1996 parole consideration hearing because no interpreter was available). Inmates with established needs are sometimes provided with accommodations that are inappropriate, insufficient, and therefore useless. See, e.g., Findings, Part III.B.7.g. infra (discussing ineffective use of finger-spelling officer to try to assist David Blessing, who is deaf and cannot spell).

In addition, the BPT routinely shackles prisoners or parolees at revocation hearings--including hearing impaired prisoners who can communicate only through sign language. Strong Dec. ¶ 68; Bruce Dep. at 140:21-141:5. Shackling prevents a person from free use of the hands, a necessary condition for communicating fully in sign language. RT at 612:23-613:4, 615:5-14 (Strong); Strong Dec. ¶ 68; Paravagna Dep. at 98:ll-100:l0 (effective communication not possible

through signing when shackled); RT at 1461:19-1462:5 (Paravagna); RT at 612:23-613:4 (Strong); RT at 1007:2-5 (Nielsen) (agreeing that shackling deaf prisoner at hearing would not be giving prisoner his "best shot").

c. Attorneys

The BPT's Self-Evaluation and Transition Plan indicates that one of the means by which the BPT accommodates prisoners and parolees with disabilities is by appointing attorneys to represent those individuals at hearings. Tr. Ex. D-1 at BPT 35-54. As discussed above, as a matter of BPT policy, all inmates are provided with attorneys at life prisoner parole consideration hearings, life prisoner parole date rescission hearings, mentally disordered offender hearings and sexually violent predator hearings. RT at 927:ll-13 (Beekman); RT at 957:3-20, 965:9-20, 966:6-8 (Nielsen). Although prisoners and parolees may request attorneys for revocation and revocation extension hearings at the time a screening offer is served, they must complete a form to do so, Ex. P-163 at PC 8492, and whether an attorney is granted is at the BPT's discretion. Attorneys for prisoners are not appointed for BPT appeals on screening offers. RT at 840:18-84:4 (Connolly); Martinez Dec. ¶ 42.

Disabled inmates are often hindered in their ability to secure/an attorney by their disabilities. As discussed above, disabled prisoners often cannot read, or understand, the forms required to request an attorney, arid Hearing Agents and correctional counselors may not recognize when learning or developmentally disabled prisoners or parolees require assistance. Moreover, as discussed above, learning or developmentally disabled prisoners or parolees may be less able to advocate on their own behalf, or to appeal an unfavorable decision. Cowardin Dec. ¶ 390.

One BPT Commissioner testified that attorneys should routinely be appointed for parole revocation hearings for

mentally ill, mentally retarded and visually impaired prisoners, and prisoners who cannot read and write. RT at 924:3-16 (Beekman). However, attorneys are not appointed to represent many such disabled individuals, even upon their request. Derning Dec. ¶¶ 72, 92, 104, 106, 109, 118; RT at 861:13-862:22, 863:25-867:5, 867:17-868:22 (Mincey); RT at 1029:12-22 (Nielsen); Martinez Dec. ¶ 41. The failure to appoint an attorney can have serious repercussions. As discussed above, effective self-representation by disabled prisoners or parolees at the hearings is virtually impossible.

Even the appointment of an attorney may not be an effective accommodation. RT at 71:4-14 (Cowardin). Absent a request from the attorney for a special grant of additional time, the amount of time that appointed attorneys can spend with a client is limited by BPT policy. Four to eight hours is the total time allotted for representation, including travel and hearing time. Derning Dec. ¶¶ 120, 185; RT at 52:4-52:6, 71:4-22, 95:17-25, 98:23-99:10, 105:20-25 (Cowardin); RT at 538:6-9 (Martinez); RT at 1036:l-11 (Nielsen)

Attorneys. Attorneys may have only a short time to spend with a prisoner or parolee, and may not meet the prisoner or parolee until the day of the hearing. RT at 105:12-106:8 (Cowardin). Yet it often takes longer to provide legal services to a disabled, as opposed to non-disabled, prisoner or parolee when the attorney is also responsible for accommodating the individual's disability. For example, as has already been discussed, reading aloud to vision impaired persons consumes roughly twice as much time as communicating with persons who are not vision impaired and can read material by themselves. RT at 532:21-23 (Martinez). Without allotting more time to the attorneys, simply providing an attorney is therefore not a sufficient accommodation. RT at 532:24-533:2 (Martinez); Martinez Dec. ¶ 42.

Further, the BPT does not provide any training to appointed attorneys to identify any particular disabilities,

including learning disabilities and developmental disabilities, Dunlap Dep. at 153:4-10; RT at 962:13-17 (Nielsen). Nor does the BPT train the attorneys on how to accommodate disabled inmates. Derning Dec. ¶ 185; Nielsen 1999 Dep. at 34:21-35:l; RT at 51:14-52:15 (Cowardin); RT at 962:13-17 (Nielsen). Chairman Nielsen testified that the BPT does not have responsibility for assuring that the attorney communicates effectively with his or her client. Nielsen 1995 Dep. at 50:18-22. Without training, the attorneys cannot provide the types of assistance the prisoners and parolees require to participate meaningfully in BPT proceedings. RT at 71:4-72:15 (Cowardin). Chairman Nielsen admitted that there are no obstacles to requiring disabilities training for the attorneys qualified to be on the list to be appointed for parolees. RT at 1043:17-24 (Nielsen). Alternatively, he conceded that the BPT could provide training. RT at 1043:25-1044:3 (Nielsen).

For these reasons, providing an attorney, without additional accommodation, may not give a disabled prisoner or parolee the assistance that he or she requires. RT at 51:16-52:15, 71:4-72:15 (Cowardin); RT at 532:14-533:17, 559:19-560 (Martinez).

7. Vision or Hearing Impaired or Learning or Developmentally Disabled Prisoners and Parolees

Plaintiffs offered testimony from numerous prisoners and parolees with disabilities with whom the BPT had failed effectively to communicate. The examples that follow are illustrative of the pervasive effects of the problems discussed above.

a. Allan Franks

Allan Franks is legally blind. He signed a waiver of attorney representation at his screening offer. As discussed above, the waiver form is not available in alternative formats for

the vision impaired. Mr. Franks did not know that he could request an attorney for his parole revocation hearing. Tr. Ex. P-228 at DVI 4535. He was unrepresented at his revocation hearing.

Associate Chief Deputy Commissioner Michael Connolly, who signed the denial of Mr. Franks' subsequent appeal, did not know if the waiver of attorney representation form had been read to Mr. Franks or if any investigation had been conducted to determine if the form had been read to him. Martinez Dec. ¶ 47; Tr. Ex. P-228 at DVI 4535; Connolly Dep. at 86:20-87:15. The appeal was denied without speaking to Mr. Franks; the BPT merely reviewed the written forms and listened to the hearing tape. RT at 850:23-852:25 (Connolly) .

b. Richard Davis

Richard Davis is mentally retarded. Derning Dec. ¶ 91. The CDC concluded that Mr. Davis "requires assistance with legal process, classification, and disciplinary hearings, etc." Derning Dec. ¶ 90. Notwithstanding this diagnosis, on March 9, 1995, despite having previously requested both a revocation hearing and the assistance of an attorney, Mr. Davis signed an unconditional Waiver of Parole Revocation Hearing, resulting in a prison term of twelve months, the maximum allowable. Derning Dec. ¶ 92; Tr. Ex. P-122 at ARMCAL 339. There is no indication that the District Hearing Agent recognized or accommodated Mr. Davis' disability, despite Mr. Davis' inability to understand the proceedings or to advocate for himself effectively. Derning Dec. ¶ 94.

c. David Badillo

David Badillo is a "basic non reader," meaning that he is functionally, if not wholly, illiterate. Derning Dec. ¶ 65 ; Tr. Ex. P-112. He is unable to spell his own name consistently. Id. CDC clinical staff concluded that he is mildly to moderately mentally retarded, with cognitive abilities described as

restricted, poor [and] simplistic." Derning Dec. ¶ 65; Tr. Ex. P-111.

Nonetheless, Mr. Badillo repeatedly signed waiver forms between 1993 and 1998 (Form 1102A on June 10, 1993 (Tr. Ex. P-112 at ARMBAD 1473), Form 1101 on August 9, 1995 (Tr. Ex. P-112 at ARMBAD 1469), Form 1101 on July 13, 1996 (Tr. Ex. P-112 at ARMBAD 1465), Form 1100(a) and Form 1101 on July 16, 1997 (Tr. Ex. P-112 at ARMBAD 1461, 1462), and Form 1104A in September 1998 (Tr. Ex. P-112 at ARMBAD 1455). There is no indication that Mr. Badillo received the assistance he requires in order to read and comprehend the forms he signed. Derning Dec. ¶ 72. Without such assistance, Mr. Badillo could not have understood the forms he was signing, nor the rights he was waiving by signing them. Id.

d. Timothy Davis

Timothy Davis is designated by the CDC as "Category K," indicating a developmental disorder, and CDC psychiatrists and a California Department of Mental Health psychiatrist have diagnosed him as mentally retarded. Derning Dec. ¶ 96; Tr. Ex. P-123 at ARMCAL 7982-83, 7966-71. He cannot read, write or sign his name. Derning Dec. ¶ 100; Tr. Ex. P-123 at ARMCAL 7982.

Mr. Davis twice executed a Form 1101, waiving his right to a revocation hearing, and failed to request the assistance of an attorney or the presence of witnesses, despite the fact that he wanted a hearing held so that he could challenge the revocation charges. Derning Dec. ¶ 104, 106; Tr. Ex. P-123 at ARMCAL 8082-83, 8104. This reflects Mr. Davis's inability to understand the forms he was signing and the absence of basic cognitive and adaptive skills necessary to do so. Derning Dec. ¶ 107. Moreover, on three other occasions, Mr. Davis waived his rights to a revocation hearing, resulting in the imposition of three twelve-month sentences, the maximum allowable. Derning

Dec. ¶¶ 110, 111, 115; Tr. Ex. P-123 at ARMCAL 8072, 8074-75, 8062-63. His willingness repeatedly to waive his rights to a hearing and agree to the maximum revocation term allowed by law raises an inference supporting the finding that he did not receive the accommodations he requires. See Derning Dec. ¶ 116.

e. Flora Abrams

Flora Abrams is learning disabled, dyslexic and has attention deficit disorder. She unconditionally waived her right to a parole revocation hearing every time she was presented with a screening offer. Tr. Ex. P-143 at PC 479, 483 and 485. Nobody read the documents to her or verified that she understood the proceedings. Abrams Dep. at 24:9-11. She testified that she was not informed nor did she know that she had options other than accepting the offer. Abrams Dep. at 24:12-17, 35:1-23. See also Cowardin Dec. ¶¶ 103-06.

f. Bruce Lambert

Bruce Lambert is deaf, can read at a sixth or seventh grade level and can sign. RT at 702:21-22, 703:11-24 (Lambert). He does not correctly identify the words "subject" or "period." When Mr. Lambert was released from prison in 1995, he signed his conditions of parole form, but he did not understand the entire form or all of its conditions; he was not provided with an interpreter even though he asked for one. RT at 707:10-20, 708:14:22 (Lambert).

No interpreter was provided for him during three separate screening offers in which he waived his revocation hearings and accepted a prison sentence, even though he did not understand the forms he signed. Strong Dec. ¶ 44. Indeed, Mr. Lambert testified that he did not understand the phrase "waiver of revocation hearing" itself. RT at 705:16-20 (Lambert). Thus, he executed a Form 1101 without understanding that he had the option of not signing it and having a hearing with the BPT to

determine whether he should be sent back to prison at all. RT at 704:22-705:11 (Lambert).

Mr. Lambert testified that he was provided with a sign language interpreter at his February, 1997 BPT hearing, but both his wrists were handcuffed at his waist. RT at 713:15-714:1 (Lambert). This shackling prevented him from communicating with his lawyer during a brief meeting before the hearing. RT at 714:20-715:4 (Lambert). During the hearing, one hand was freed, but he is unable to sign effectively with only one hand, and had to resort merely to spelling a few words. RT at 734:15-735:14 (Lambert). He was prevented from effective communicating with either his lawyer or the BPT Commissioners. Because of this experience, in February, 1998, he decided to waive a revocation hearing because he felt it would be futile, and instead accepted nine months of incarceration. RT at 744:7-12 (Lambert).[8]

After the February, 1997 hearing, he filed two appeals. Tr. Ex. P-209; RT at 1193:23-1194:15 (Connolly). His second appeal, based on his claim that he was unable to communicate effectively at his revocation hearing because he was denied effective assistance of a sign language interpreter, was summarily denied because he already had one on file related to that proceeding. RT at 1195:2-1196:6, 1196:8-1199:5 (Connolly).

g. David Blessing

David Blessing, who is permanently deaf and reads at a fifth grade level, on three separate occasions waived his revocation hearings, in each case receiving the maximum allowed sentence. Strong Dec. ¶ 43; Blessing Dep. at 22:18-23:7, 26:16-27:7; Tr. Ex. P-201 at PVSP 6621, 6629 and 6635.

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[8] Similarly, Michael Honore was unable to communicate at his parole revocation hearings because both of his hands were shackled. Honore Dep. at 18:2-9, 34:3-9.

He requested an interpreter when his screening offer was presented, but was provided with an officer who only knew some finger spelling. Blessing Dep. at 20:17-21:2, 30:25-31:3; Tr. Ex. P-201 at PVSP 6621, 6625, 6629 and 6635. As Dr. Strong put it, "Mr. Blessing already knows how to read letters; his problem is that he does not comprehend what the words mean." Strong Dec. ¶ 42.

On one occasion when Mr. Blessing was presented with a screening offer he requested a hearing and was told by the officer to sign certain forms. Mr. Blessing did not understand the forms he received and believed he would receive a revocation hearing. Instead, by signing the forms, he waived his right to a hearing. Blessing Dep. 22:18-23:7, 26:16-27:7. Mr. Blessing also did not at first know there was an appeal process and did not understand how to appeal and use the Form 1040. Blessing Dep. 29:6-24.

Mr. Blessing's willingness repeatedly to waive his rights to a hearing and agree to the maximum revocation allowed by law raises and inference supporting the finding that he did not receive the accommodations he requires to understand the waiver (and other) forms.

h. Estelle Holloway

Estella Holloway is developmentally disabled and mentally retarded. RT at 192:3-13 (Derning); Derning Dec. ¶ 125. Dr. Ted Ruggles, Chief Psychologist for Pelican Bay State Prison, confirmed this diagnosis. RT at 192:14-193:1 (Derning). Ms. Holloway three times executed forms accepting revocation sentences while waiving her right to a hearing. Derning Dec. ¶¶ 126-29; Tr. Ex. P-131 at ARMCAL 1681, 1661-62, 1666, 1668-69. Due to her disabilities, in order to make an informed decision, she requires assistance from somebody who is able to help her understand the screening offer, the various forms and the rights she has during BPT proceedings. Derning Dec. ¶ 130. The BPT did not present any evidence that Ms. Holloway

received any accommodations. RT at 194:9-16 (Derning). Ms. Holloway's willingness repeatedly to waive her rights to a hearing and agree to the maximum revocation allowed by law raises an inference supporting the finding that she did not receive the accommodations she requires to understand the waiver (and other) forms.

i. Clifton Feathers

Clifton Feathers has not been able to review his central file since 1993, when he lost his ability to read. Martinez Dec. ¶ 55; Feathers Dep. at 34:18-24. Mr. Feathers' life prisoner evaluation, prepared prior to his 1997 parole consideration hearing, indicated that he had "declined" his file review "due to blindness." Tr. Ex. P-224 at CMF 10681. However, Mr. Feathers indicated that he was not offered a reader, Feathers Dep. at 34:25-35:6, 35:18-35:24, and his file does not indicate that he had an opportunity to use auxiliary equipment. Mr. Feathers testified that he was unable to understand the documents he was given at his hearings because he cannot read and there was no one to read them to him. Feathers Dep. at 16:4-9. Chairman Nielsen admitted during the trial that it was improper to give a blind inmate documents without providing for assistance in reading them. RT at 1008:25-1009:4 (Nielsen).[9]

j. Willie Johnson

Willie Johnson is vision impaired. He was assisted by a CDC-provided reader at his 1998 documentation hearing. Martinez Dec. ¶ 53; W. Johnson Dep. at 43:14-44:2. However, the reader merely asked him which documents he wanted read to him from the central file, when Mr. Johnson wanted to

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9. Mr. Feathers' case is not unique. Martinez Dec. ¶ 44; Tr. Ex. P-239 at PVSP 4641 (Martin Ramirez's file states, "Inmate blind unable to review file"); Tr. Ex. P-240 at ASP 15430 (Juan Urraca's file review correction form reads only, "Inmate is blind"); RT at 865-67 (Mincey).

review the entire file. Id. He was allowed one hour with the reader for this purpose. Martinez Dec. ¶ 53; W. Johnson Dep. at 22:6-22:23. An hour might have been enough time for a sighted person, but for Mr. Johnson, it was not. Martinez Dec. ¶ 53 n.10.

k. Dennis Barnett

Dennis Barnett is mentally retarded. He filed an appeal after signing a waiver, on the grounds that he did not understand the rights he had waived. Commissioner Connolly approved the denial of the appeal because (1) Mr. Barnett was housed in the general population, (2) he had been through screening offers before and (3) the District Hearing Agent was "quite competent in determining the parolee's mental status," even though he did not know what training this Hearing Agent had. RT at 1179:15-1180:12, 1183:12-15, 1184:1-11, 18-23 (Connolly) Tr. Ex. P-114.

l. Kiah Mincey

Kiah Mincey is unable to read documents because he is vision impaired. However, he was not made ware of the Form 1073 at one of his screening offers. RT at 864:15-18 (Mincey). He was denied an attorney–or any other form of assistance from the BPT–for a parole revocation hearing. Mincey Dep. at 20:11-20:22. The notice of the denial was sent through institutional mail, in an inaccessible format, despite the fact that the BPT was aware of Mr. Mincey's vision impairment. RT at 531:2-15 (Martinez); Tr. Ex. P-236 at PC-3687; Mincey Dep. at 16:18-17:5.

After he was denied representation, and a reader, Mr. Mincey found a fellow inmate to read documents to him in order to prepare for his parole revocation hearing. Martinez Dec. ¶ 61; RT at 861:16-19, 862:16-22, 865:7-866:20, 867:3-5, 867:12-16 (Mincey); Mincey Dep. at 11:3-12, 16:18-17:25, 20:14-16; Tr. Ex. P-236 at PC-27303. However, because this

inmate was not allowed to accompany Mr. Mincey to the parole revocation hearing, no one was available to read him the documents that were presented to him at the hearing. Martinez Dec. ¶ 61; RT at 867:3-16 (Mincey).

After his hearing, Mr. Mincey was unable to file an appeal regarding the hearing, or the BPT's denial of counsel, because the appeal form was not in an accessible format. RT at 868:5-22 (Mincey); Mincey Dep. at 22:9-23:6. According to Mr. Mincey "it can be difficult" for him to find someone to read and write documents for him. Martinez Dec. ¶ 61; Mincey Dep. at 20:14-16.

m. Geoffrey Lear

Geoffrey Lear, who is deaf and uses sign language, responded to his screening offer with a handwritten note: "OK. But I don't want to go to B.P.T." He then wrote, "How much I get time in prison?" The District Hearing Agent replied in writing that the BPT was offering twelve months "straight time." Mr. Lear wrote, "I'm [sic] give-up I don't want go to B.P.T." But when the Hearing Agent prepared to cancel the revocation hearing, Mr. Lear wrote, "Hold it wait see go to B.P.T. maybe I will not accept [sic] 12 mos." The Hearing Agent responded, "So which is it? accept offer or hearing?" Mr. Lear and the Hearing Agent exchanged further messages that the Hearing Agent interpreted to mean Mr. Lear would accept the offer and waive his hearing. When the Hearing Agent wrote that he would get the forms ready and asked Mr. Lear if he had any questions, however, Mr. Lear wrote, "I go to B.P.T. I need interpreter OK please?" The forms apparently were signed, but Mr. Lear continued to request an interpreter. The Hearing Agent wrote "Interpreter for what? The forms you

signed mean you'll serve 12 months straight and there is not going to be a hearing on March 4th!" In response to this, Mr. Lear's final note read, "March 4 go to BPT[10] cool where?" Tr. Ex. P-211 at ASP 14492-95; Strong Dec. ¶¶ 48-49.

The District Hearing Agent in this case clearly was not sure whether or not Mr. Lear had waived his right to a revocation hearing. In Dr. Strong's phrase, they are "communicating at cross purposes." Strong Dec. ¶ 49.

C. Life Prisoner Parole Consideration Hearings

Disabled inmates experience disability-related difficulties with all three phases of life prisoner parole consideration hearings. Many of these difficulties are similar to those discussed immediately above, relating to the BPT's failure to communicate effectively with prisoners and parolees with disabilities. Further problems related to life prisoner parole hearings are caused by the BPT's failure to modify in light of class members' disabilities the criteria it considers at these hearings, particularly with respect to the second and third phases of these hearings.

1. Review of Commitment Offense

In the first phase of life prisoner parole consideration hearing, limitations on the ability of learning disabled and developmentally disabled inmates to communicate articulately can lead to the impression that they are not expressing adequate remorse. RT at 63:11-64:2 (Cowardin). Additionally, weakness in their cognitive functions, such as memory, can inhibit their ability to react in a way that is perceived as appropriate. RT at 62:21-63:10 (Cowardin).

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10. In the note, the words "go to BPT" have been crossed out.

2. Participation in Programs and Behavior While in Prison

If a prisoner has not participated in programs in accordance with the BPT's recommendations regarding educational and vocational attainment, that reflects negatively on the prisoner in the second phase of his or her parole consideration hearing. RT at 64:19-67:10, 109:4-110:4 (Cowardin).

It is unrealistic to require educational progress from inmates with learning disabilities or developmental disabilities without offering special education. BPT Commissioners often do not understand these disabilities, and they have not been provided with any training to understand learning disabilities or developmental disabilities. As a result, the commissioners are not able to make realistic or appropriate recommendations for inmates with such disabilities. Cowardin Dec. ¶ 418.

The absence of adequate reading skills also prevents many such inmates from participating in vocational programs because they cannot meet the minimum criteria for participation. RT at 64:19-65:19 (Cowardin). Yet, these inmates are criticized in parole hearings and told that they should be upgrading educationally or vocationally.

In addition, when BPT Commissioners recommend programs for prisoners in connection with parole consideration hearings, they do not know which CDC programs are accessible for prisoners with disabilities. Strong Dec. ¶ 75; Robertson Dec. ¶¶ 110-16; RT at 1132:12-25 (Trott). Nor does the BPT take into consideration the prisoner's disability, such as blindness, when making recommendations for programs relating to parole consideration. Martinez ¶¶ 85-86.

Disabled prisoners may also be discriminated against during this phase of the hearing if they have been the subject of disciplinary action related to their disabilities, such as being written up for being out of bounds when they could not read the

out of bounds sign. RT at 66:19-25 (Cowardin); Richardson Dep. at 59:20-60:8.

3. Plans in the Event of Parole

Disabled inmates are not provided with assistance in arranging parole plans and soliciting letters of support that are needed for the third phase of these hearings. This can work against them if their disabilities limit their ability to take such action on their own. RT at 67:11-68:14 (Cowardin). Additionally, without adequate identification of disabled inmates and the limitations resulting from their disabilities, the BPT cannot accurately assess their suitability to return to the community. RT at 339:7-340:23 (Derning).

4. Life Prisoners with Disabilities

Plaintiffs offered evidence regarding the difficulties experienced by numerous class members at parole consideration hearings. The Court discusses two of these examples below.

a. Clifton Feathers[11/]

When Clifton Feathers was being considered for parole, the panel of Commissioners recognized that he was legally blind in both eyes and was deemed unable to work by the CDC. Tr. Ex. P-266. In addition, his lawyer told the BPT that, according to CDC medical staff, "he is rapidly deteriorating . . . He's in a wheelchair, as you can see, and his right leg is still affected from his stroke." The lawyer informed the panel that Mr. Feathers had chronic pulmonary disease, multiple heart attacks, diabetes, arthritis, hypertension, severe back problems and prostate cancer. Tr. Ex. P-226 at 27:11-27:23. Nonetheless, one of the factors on which the Commissioners relied in

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11. Certain other difficulties experienced by Mr. Feathers due to the BPT's failure effectively to communicate with him have already been discussed.

denying Mr. Feathers parole was the fact that he had "failed to develop a marketable skill that can be put to use upon release. Failed to upgrade educationally and vocationally as previously recommended." Tr. Ex. P-226 at 43:3-43:9, 44:1-44:4.

b. Elio Castro

Elio Castro is mentally retarded and deaf. However, notwithstanding that Mr. Castro had informed the Commissioners that no interpreter was available at Alcoholics Anonymous meetings, the commissioners in September, 1996 reaffirmed a recommendation that he participate in an Alcoholics Anonymous program. Tr. Ex. P-203 at ASP-11695, 11727, 11919, 11979; Tr. Ex. P-205 at 17, 30; Strong Dec. ¶ 76.

D. Other Issues Related to BPT Policies, Practices and Procedures

1. Self-Evaluation and Transition Plan

The BPT published its Self-Evaluation and Transition Plan on October 24, 1997, more than four and one-half years after the time required under the ADA for the completion of a self-evaluation, and over five and one-half years after the deadline for publication of a transition plan. Tr. Ex. D-1.

The Self-Evaluation and Transition Plan identified BPT executive board meetings and regulatory public hearings as being relevant to Title II of the ADA. Id. at BPT 41. The Self-Evaluation Plan also identified the parole-related hearings conducted by the BPT–parole revocation and parole revocation extension hearings, life prisoner hearings, mentally disordered offender hearings, and sexually violent predator probable cause hearings–as being relevant to Title II. Id.

However, the Self-Evaluation Plan did not include a review of various BPT programs and services. First, the Plan did not include a survey or evaluation of the accessibility of hearing

locations. Tr. Ex. D-1; RT at 1002:15-1003:10 (Nielsen); RT at 1414:18-1415:4, 1447:14-22, 1448:3-5 (Paravagna); Paravagna Dep. at 49:1-50:4, 52:10-25; RT at 425:21-428:20 (Robertson). Neither did the Self-Evaluation Plan evaluate the screening process or the BPT's relationship with the CDC as it affects accommodation of disabilities. Tr. Ex. D-1; RT at 1449:7-1450:5, 1451:24-1452:23 (Paravagna); Robertson Dec. ¶ 19, RT at 425:21-428:20 (Robertson). The Plan also failed to address potential barriers in access to the BPT's programs and services for individuals with disabilities, such as the possibility that the forms used by the BPT would present barriers to individuals who are vision impaired or who have developmental or learning disabilities. Id. The Plan further failed to evaluate the accessibility of educational and vocational programs recommend to prisoners to obtain parole at parole consideration hearings, Robertson Dec. ¶ 19, and failed to evaluate the grievance process, RT at 425:21-428:20 (Robertson). In addition, the Self-Evaluation Plan did not evaluate the Hearing Agent Guidelines, which instruct the Hearing Agents on how to carry out their responsibilities in connection with BPT screening offers. Tr. Ex. D-1, P-52.

In fact, the Self-Evaluation and Transition Plan did not identify a single barrier to access, RT at 1388:4-7 (Dunlap), an omission which Plaintiffs' expert, Mr. Robertson, had never encountered in the hundreds of Self-Evaluation and Transition Plans he has reviewed, RT at 425:21-428:20 (Robertson). Accordingly, the Self-Evaluation Plan did not discuss the methods or standards to use to eliminate or mitigate physical and communicative barriers to accessing the BPT's programs and services. Tr. Ex. D-1; RT at 425:21-428:20 (Robertson); Martinez ¶ 28.

2. Administrative Directive

The BPT issued Administrative Directive No. 98/1 on February 23, 1998. Tr. Ex. D-4. This Administrative Directive served to implement the BPT's Americans with Disabilities Act

Plan. Id.; RT at 791:3-7 (Connolly); RT at 984:7-16 (Nielsen). The BPT did not have any formal policy or procedure regarding the ADA prior to the issuance of Administrative Directive 98/1. RT at 995:20-997:2 (Nielsen).

The Administrative Directive relied on the use of the Form 1973 as the means by which disabled persons would be notified of their right to freedom from discrimination on the basis of their disabilities and of their right to request a reasonable accommodation. Tr. Ex. D-4. This form, however, is inaccessible to individuals with learning or developmental disabilities and hearing or vision impairments, as discussed above. The Administrative Directive did not establish any policies or procedures to ensure that the Form 1073 is communicated to learning or developmental disabled and hearing or vision impaired persons in a manner in which such disabled individuals can understand it. Tr. Ex. D-4.

In addition to requiring the service of the Form 1073 on all prisoners or parolees prior to every BPT hearing, the Directive required that the staff member serving the documents ask the individual whether he or she has a disability, as defined under the ADA, that requires reasonable accommodation. Tr. Ex. D-4. The Administrative Directive did not set forth a definition of an ADA disability or a definition of a reasonable accommodation under the ADA. It also required staff to make a determination of whether the prisoner or parolee is unable to understand these complex questions. Tr. Ex. D-4. The Directive did not set forth procedures for determining whether prisoners or parolees understand te inquiry and whether they knowingly waive the right to a reasonable accommodation under the ADA. Tr. Ex. D-4.

No one within the BPT has ever evaluated the adequacy of the Administrative Directive in implementing the ADA. RT at 1390:8-11 (Dunlap). In fact, many BPT Commissioners are not even familiar with this document or its contents. Bybee Dep. at

26:9-26:18; Gillis Dep. at 49:9-49:14; Koenig Dep. at 18:20-19:8; Williams Dep. at 26:12-26:22.

3. Hearing Agent Guidelines for Parole Revocation and Revocation Extension

In July, 1996, the BPT updated its Hearing Agent Guidelines for Parole Revocation and Revocation Extension (Hearing Agent Guidelines) for State-wide application by all staff of the CDC who function as Hearing Agents in parole revocation and revocation extension hearings. RT at 835:10-16 (Connolly); Tr. Ex. P-52 at BPT 637; Cowardin Dec. ¶ 381. The Hearing Agent Guidelines describe Hearing Agent duties for explaining revocation procedures to parolees, and direct Hearing Agents to emphasize the parolee's rights during the hearing process and the right to waive the hearing. RT at 1122:4-17 (Trott); Tr. Ex. P-52 at BPT 647-648. Prior to the dissemination of the original Guidelines in 1994, there were no guidelines that prepared Hearing Agents for carrying out their duties. RT at 1122:4-17 (Connolly); RT at 1149:8-18 (Trott). The 1996 version of the Guidelines contained no information on the requirements of the ADA or about identifying or accommodating disabled prisoners or parolees. RT at 836:2-13 (Connolly); RT at 1139:16-1140:4 (Trott); Cowardin Dec. ¶ 382. This version of the Hearing Agent Guidelines was in effect until April 20, 1999. RT at 836:2-5 (Connolly); RT at 1143:8-15 (Trott).

On that date, the first day of trial in this matter, the BPT put into effect a new version of the Guidelines. RT at 836:2-13 (Connolly); RT at 1143:8-24 (Trott). Defendants admitted at trial that the new guidelines were promulgated in order to include a reference to the ADA, because no such reference was contained in the first Hearing Agent Guidelines. RT at 836:2-13 (Connolly); RT at 1127:8-17 (Trott).

The new Guidelines contain a single amendment that addresses the ADA and disabled individuals. RT at 1143:8-24

(Trott). This amendment simply addresses the Form 1073; the rest of the Guidelines remain the same. Id. The new Guidelines fail to give even a definition of the disabilities that are covered by the ADA despite the fact that the Guidelines are the single source of documentary information Hearing Agents are provided in order to perform their duties. RT at 1135:6-12. 1146:7-9 (Trott).

The Guidelines do not address any specific disability, nor do they inform Hearing Agents about how to identify or accommodate any disability. RT at 185:17-186:10 (Derning); RT at 1139:11-15, 1146:7-9 (Trott). Neither do the Guidelines require that sign language interpreters be provided at screening offers for deaf individuals, or direct that documents should be read to any disabled individual who cannot read. RT at 837:22-838:7 (Connolly); RT at 1139:11-15 (Trott).

Further, the Guidelines fail to give any guidance to the Hearing Agent as to how to ascertain whether a parolee understands the Form 1073. RT at 1145:18-21 (Trott). The Guidelines fail to define the terms "effective participation" and "reasonable accommodation" although they use that language. RT at 1146:24-1147:4 (Trott).

4. Training

a. District Hearing Agents

As noted, the BPT relies on CDC employees, the District Hearing Agents, to present screening offers to prisoners and parolees, to serve and explain the accompanying forms, and to inform prisoners and parolees of their rights. The only training that the BPT provides to Hearing Agents regarding the screening process is the District Hearing Agent Guidelines. Tr. Ex. P-52; RT at 1134:22-1135:3 (Trott). Associate Chief Deputy Commissioner McNair testified that he trains District Hearing Agents based on the guidelines. RT at 1315:7-11 (McNair). However, the BPT's ADA Coordinator, and other

BPT officials, indicated that the BPT has no formal training for Hearing Agents other than providing the Guidelines themselves. Dunlap Dep. at 95:4-96:5; Chartrand Dep. at 35:2-5; Washington Dep. at 30:14-31:14; Gillis Dep. at 39:22-40:4; see also RT at 1135:13-24 (Trott).

Neither does the BPT train Hearing Agents how to identify or accommodate prisoners or parolees who have specific disabilities. For example, Chairman Nielsen testified at deposition in 1996 that training of screening officers regarding learning disabilities would be appropriate. Nielsen 1996 Dep. at 83:2-24. In 1999, at trial, he affirmed his former testimony but also admitted that no such training has occurred, and that he personally does not know what "LD" is or how to accommodate someone with it. RT at 1018:3-22 (Nielsen). Dr. Cowardin concluded that District Hearing Agents simply are not equipped to communicate effectively with learning disabled and developmentally disabled prisoners and parolees because the BPT provides no training in how to restate abstract information into simpler terms, to verify that a prisoner or parolee understands the information, or to ensure interactive, reciprocal participation by the prisoner or parolee. Cowardin Dec. ¶ 316.

b. BPT Staff

Tina Dunlap, staff counsel and ADA coordinator of the BPT, provided a one-hour training in December, 1997 to the BPT's Commissioners and Deputy Commissioners. Most of them have received no additional training in the identification or accommodation of individuals with disabilities. Dunlap Dep. at 85:22-86:8, 95:4-10, 119:8-120:3; Washington Dep. at 63:25-64:6, 66:16-67:16; Bruce Dep. at 144:22-24, 122:17-20; Van Court Dep. at 88:2-4; RT at 914:15-915:7 (Beekman); RT at 1014:13-19 (Trott); RT at 1132:2-4 (McNair). In addition, many of the Commissioners and appeals staff who received Ms. Dunlap's training do not remember its content. Bruce Dep. at 54:23-55:2; Gillis Dep. at 26:20-25; Van Court Dep. at 17:8-10.

Even Michael Trott, the author of the District Hearing Agent Guidelines, had no special training in connection with his work on the Guidelines; he does not consider himself to have expertise relating to the ADA. RT at 113:2-11, 1144:17-25 (Trott). The staff handling BPT appeals has had little or no training regarding disability issues. RT at 789:20-790:1 (Connolly).

The BPT does not offer any training regarding learning disabilities. RT at 1018:9-22 (Nielsen). Nor does it offer training regarding mental retardation or other specific disabilities. Bybee Dep. at 107:17-22; Underwood Dep. at 99:12-14; Van Court Dep. at 102:24-103:1; Washington Dep. at 67:14-16; RT at 1131:13-15 (Trott); RT at 1090:11-1091:1, 1092:3-1092:7 (Richardson).

The BPT does not have adequate training for the identification and accommodation of individuals with hearing impairments. RT at 611:17-612:2 (Strong). The refusal of the BPT to unshackle prisoners who were attempting to sign with interpreters during BPT proceedings is evidence of a lack of even rudimentary training about the actions that are necessary to accommodate hearing impaired prisoners. RT at 615:2-10 (Strong). A BPT Commissioner's statement to a hearing impaired prisoner struggling to understand the proceeding, "Will you please listen. . . . ," is further evidence of the inadequate training the BPT provides. RT at 619:23-620:5 (Strong).

The BPT does not provide training relating to the accommodation of visually impaired prisoners or mobility impaired prisoners. Robertson Dec. ¶¶ 139-42; RT at 535:5-15 (Martinez).

c. Summary of Issues Related to Training

BPT staff have received virtually no general training pertaining to the identification and accommodation of disabled

prisoners and parolees, RT at 176:22-177:5 (Derning); Dunlap Dep. at 95:4-10; RT at 1132:2-4 (Trott), and the BPT has not provided any general training to CDC staff who are responsible for serving screening offers. Neither has the BPT received, or provided, any training on the identification and accommodation of particular disabilities. Nielsen 1996 Dep. at 67:15-68:4, Hill Dep. at 45:14-46; DiNinni Dep. at 87:24-88:18; RT at 1398:25-13:99:3 (Dunlap); RT at 1138:13-19 (Trott).

Without training, BPT staff cannot provide a level playing field that allows disabled inmates to participate meaningfully in BPT proceedings. RT at 73:20-73:25 (Cowardin); RT at 198:7-199:6 (Derning). Without training, BPT staff also cannot make educated decisions about the best form of accommodation.

Defendants' assumption that disabilities will be obvious leads them to overlook many disabled inmates. RT at 184:1-23, 327:25-331:15 (Derning). Without training, even when staff have sufficient information before them to identify and accommodate disabilities, they do not do so because they lack the necessary skills. RT at 322:15-323:11, 323:20-331:15 (Derning).

CONCLUSIONS OF LAW

Plaintiffs filed this case under the ADA, 42 U.S.C. § 12102(2), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and 42 U.S.C. § 1983. The § 1983 claim alleges violations of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Defendants' liability under the ADA and Section 504 is discussed in Part I of the Conclusions of Law. Defendants' liability for violations of the Due Process Clause of the Fourteenth Amendment is discussed in Part II of the Conclusions of Law. Finally, the appropriate remedy is discussed in Part III of the Conclusions of Law.

I. Defendants are Liable for Violations of the ADA and Section 504

Title II of the ADA is expressly modeled after Section 504, and the courts have long relied on cases interpreting the Rehabilitation Act to interpret Title II of the ADA. See Does v. Chandler, 83 F.3d 1150, 1152 (9th Cir. 1996); Easley v. Snider, 36 F.3d 297, 300-02 (3d Cir. 1994).

The ADA and Section 504 apply to State prisoners. Pennsylvania Dep't of Corrections v. Yeskey, 524 U.S. 206 (1998); Armstrong v. Wilson, 124 F.3d 1019, 1022-25 (9th Cir. 1997), cert. denied, 118 S. Ct. 2340 (1998); 28 C.F.R. § 35.190(b)(6) (DOJ Title II regulation recognizing coverage of "correctional institutions").

A. Applicability of the Americans with Disabilities Act

The ADA was enacted on July 26, 1990 and Title II of the Act, the portion of the ADA relevant to this case, became effective on January 26, 1992.

1. Defendants are Public Entities

Title II applies to all "public entities," defined in the statute as including "any department, agency, special purpose district, or other instrumentality of a State or States or local Government." 42 U.S.C. § 12131(1)(B). The BPT is an agency of the State of California and is therefore a public entity subject to the provisions of the ADA. The individual Defendants are State public officials acting under color of State law and are sued in their official capacities only. Governor Gray Davis and California Youth and Adult Correctional Authority Secretary Robert Presley are Defendants in this case in their supervisory capacity over Defendants James Nielsen and the BPT. Order Granting in Part Defs.' Mtns. To Dismiss & Denying Pltfs.' Mtn. For Reconsideration, Mar. 25, 1999, at 8-9.

2. Plaintiffs are Qualified Individuals with Disabilities

The ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." See 42 U.S.C. §12132.

All Plaintiffs meet the essential eligibility requirements for participation in BPT proceedings in that they are prisoners or parolees subject to the BPT's authority and therefore eligible to participate in its proceedings. See Yeskey, 524 U.S. 206 (eligible individuals include inmates involved in mandatory programs).

Plaintiff class members are also individuals with disabilities. The term "disability" is broadly defined in the regulations implementing Title II of the ADA as

> a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.

28 C.F.R. § 35.104. The phrase "major life activities" is defined as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." Id. Tracking this language, the certified class includes prisoners and parolees with mobility, hearing or sight impairments, or developmental or learning disabilities, that substantially limit a major life activity. The record is clear that Plaintiffs are hearing impaired, vision impaired, mobility impaired, developmentally disabled or learning disabled, all in ways that substantially limit major life activities.

B. Applicability of Section 504

Section 504 prohibits discrimination against any "individual with a disability" by any entity that receives federal financial assistance. It also guarantees those individuals meaningful access to programs or activities receiving federal financial assistance. Alexander v. Choate, 469 U.S. 287, 301 (1985). Regulations implementing Section 504 were enacted in 1978, and are codified at 28 C.F.R. part 41. It is undisputed that the class of Plaintiffs involved in this lawsuit meets Section 504's definition of "individuals with a disability."

Defendants are State entities that receive federal financial assistance. The BPT is a State entity under the authority of the Youth and Adult Correctional Agency (YACA) of the State of California. Robert Presley, the Secretary of YACA, is a Defendant in his official capacity in this case. Because YACA receives federal financial assistance, the BPT and other Defendants are covered under Section 504. YACA is responsible for maintaining and coordinating policy for its boards and departments, which include coordinating policy for its boards and departments, which include the BPT and the CDC, and for ensuring compliance with the law. YACA, through the Department of Corrections, one of its constituent departments, receives federal funds.

In 1988, the Civil Rights Restoration Act amended Section 504's definition of "program or activity" to include "all the operations of . . . a department, agency, special purpose district, or other instrumentality of a State or of a local government." 29 U.S.C. § 794(b)(1)(A). The BPT, as a department of YACA, is therefore subject to Section 504.

C. Defendants have Violated the Anti-Discrimination Provisions of the ADA and Section 504, and the Regulations Implementing Those Provisions

Defendants have engaged in systematic and widespread discrimination against Plaintiffs, and members of the Plaintiff class, by reason of their disabilities, by denying them the benefits of the services, programs and activities operated by the BPT.

The anti-discrimination provision of Title II provides that:

> no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. Similarly, Section 504 states:

> No otherwise qualified individual with a disability in the United States, as defined in section 706(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 794(a). These statutory provisions require that covered entities refrain from discriminatory conduct and take affirmative steps, spelled out in implementing regulations, to ensure non-discrimination. This non discrimination mandate is primarily implemented through three specific requirements: public entities must (1) provide access to programs, (2) provide

effective communications and (3) modify policies, practices and procedures to accommodate persons with disabilities.

1. Obligation to Provide Access to Programs

The program access obligation provides that:

> Except as otherwise provided in § 35.150, no qualified individual with a disability shall, because a public entity's facilities are inaccessible to or unusable by individuals with disabilities, be excluded from participation in, or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

28 C.F.R. § 35.149 (ADA); see also 28 C.F.R. § 41.56 (Section 504). The BPT's programs, services or activities include hearings and procedures, as well as programs, services or activities required by the BPT as conditions for parole or for obtaining a parole date.

In addition, "a public entity may not in determining the site or location of a facility make selections—(i) that have the effect of excluding individuals with disabilities from, denying them the benefits of, or otherwise subjecting them to discrimination; or (ii) that have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the service, program, or activity with respect to individuals with disabilities." 28 C.F.R. § 35.130(b)(4) (ADA); see also 28 C.F.R. § 41.51(b)(4) (Section 504).

A public entity need not necessarily make each of its existing facilities accessible. However, each of the entity's services, programs and activities must be operated so that, when viewed in its entirety, it is readily accessible to and usable by individuals with disabilities. 28 C.F.R. § 35.150(a) (ADA); 28 C.F.R. § 41.57(a) (Section 504).

These mandates apply to the existing facilities the BPT uses for its programs. 28 C.F.R. § 35.150(b) (ADA); 28 C.F.R. § 41.57(b) (Section 504). Public entities like the BPT may meet the accessibility requirements for existing facilities in a variety of ways, including relocating programs or services to accessible buildings, constructing new facilities or modifying existing buildings so that they are accessible. 28 C.F.R. § 35.150(b) (ADA); see also Schonfeld v. City of Carlsbad, 978 F. Supp. 1329, 1337 (S.D. Cal. 1997), aff'd 172 F.3d 876 (9th Cir. 1999). Any method that results in "making [the public entity's] services, programs, or activities readily accessible to and usable by individuals with disabilities" will be appropriate, provided that the public entity gives priority to those methods that offer the programs in the most integrated setting appropriate. 28 C.F.R. § 35.150(b)(1) (ADA); see also 28 C.F.R. § 41.51(d) (Section 504). For example, a public entity may comply by delivering services by assigning aides to program beneficiaries. See Tyler v. City of Manhattan, 857 F. Supp. 800 (D. Kan. 1994).

Based on the essentially undisputed evidence presented by Plaintiffs in this case, it is clear that the BPT's existing facilities are far from readily accessible to persons with disabilities. It is further clear that the BPT's failure to address or remedy the problem has resulted in its programs being inaccessible and unusable by members of the class when those programs are viewed in their entirety. The Court therefore concludes that the BPT has failed to meet its obligations under 28 C.F.R. § 35.150(a) and 28 C.F.R. § 41.57(a).

2. Obligation to Provide Effective Communications

Federal regulations mandate that public entitles "ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others." 28 C.F.R. § 35.160 (ADA); see also 28 C.F.R. § 41.51(e) (similar regulation implementing

Section 504 that applies to communications with persons with impaired vision and hearing). The Court concludes, based on a thorough review of the evidence, that the BPT has not taken appropriate steps to ensure that communications with Plaintiffs and class members are as effective as communications with other prisoners and parolees. Defendants' forms and notices are not provided in alternative forms suitable for prisoners and parolees with vision or hearing impairments, or for learning or developmentally disabled prisoners and parolees. Furthermore, Defendants' policies and procedures for access to supporting documents and files, screening offers, hearings and appeals do not allow for effective communications with Plaintiff class members.

The Court further concludes that the BPT has failed to provide "appropriate auxiliary aids and services," as required under the ADA by 28 C.F.R. § 30.160(b)(1), and that the BPT has failed to give "primary consideration to the requests of the individual with disabilities" in "determining what type of auxiliary aid and service is necessary," as required by 28 C.F.R. § 30.160(b)(2). As described in the findings of fact, there are numerous examples of the BPT's failure to provide such auxiliary aids and services. Such auxiliary aids and services include but are not limited to qualified interpreters, note takers, transcription service, written materials, assistive listening devices, assistive listening systems, video text displays, qualified readers, taped texts, audio recordings, Braille materials and large print materials. See 28 C.F.R. § 35.104 (ADA regulation defining auxiliary aids and services). Among other violations of the ADA, the BPT failed to provide effective American Sign Language interpretation services to hearing impaired prisoners and parolees, failed to provide Braille materials, large print materials, audio tapes or qualified readers for visually impaired prisoners and parolees, failed to provide qualified readers for learning disabled prisoners and parolees, and failed to provide trained staff capable of effectively communicating with mentally retarded or learning disabled prisoners and parolees. These omissions also violate Section

504. See 28 C.F.R. §§ 41.51(b) (generally) & 41.51(e) (hearing and vision impaired).

3. Obligation to Modify Policies, Practices and Procedures

Federal regulations implementing the ADA require a public entity to "make reasonable modifications in policies, practices or procedures when the modifications are necessary to avoid discrimination on the basis of disability." 28 C.F.R. § 35.130(b)(7). The Court concludes, based on a thorough review of the evidence, that the BPT has failed to make reasonable modifications in policies, practices and procedures to avoid discrimination on the basis of disability. Among other violations of §35.130, the BPT has failed to modify its programs to remedy the accessibility and communication barriers discussed in the two sections immediately above. Moreover, the BPT has failed to consider disabled prisoners' inability to participate in the vocational and educational programs of the CDC when considering whether to recommend a life prisoner for parole. See also 28 C.F.R. § 41.51(b)(3) (regulation implementing Section 504 that prohibits the utilizing of criteria that have the effect of discriminating against qualified persons with disabilities or that "have the purpose or effect of defeating or substantially impairing accomplishment of the recipient's program" with respect to qualified persons with disabilities).

D. Self-Evaluation and Transition Plan

The regulations implementing the ADA contain a number of specific requirements designed to ensure that the framework exists for a public entity to carry out the substantive mandates of the ADA. The requirements that are at issue in this litigation are set forth below.

1. Self-Evaluation

Pursuant to the regulations implementing the ADA, a public entity shall, by January 26, 1993, "evaluate its current services, policies, and practices, and the effects thereof, that do not or may not meet the requirements of this part, and to the extent modification of any such services, policies and practices is required, the public entity shall proceed to make the necessary modifications." 28 C.F.R. § 35.105(a). A public entity must include, in the self-evaluation, facilities that they do not own, if the public entity offers services in that facility. See Tyler v. City of Manhattan, 857 F. Supp. 800, 815 (D. Kan. 1994) (city could not omit building from its self-evaluation merely because it did not own it).

The BPT did not conduct a self-evaluation of its programs, services and activities within the time described in 28 C.F.R. § 35.105. It is undisputed that the BPT failed to conduct a self-evaluation on or before January 26, 1993. The self-evaluation that it did conduct, more than four years late, is inadequate. The BPT did not evaluate for accessibility any of the facilities in which it conducts hearings. See 28 C.F.R. § 35.105(a). Moreover, the BPT's self-evaluation did not address the screening process, appeal process, adequacy of forms or other important elements of the BPT's programs and activities.

2. Transition Plan

The regulations implementing the ADA require that public entities that employ more than fifty persons, and that are required to undertake structural changes to provide program access, prepare a transition plan that identifies physical barriers ad outlines the methods to be used to remove physical barriers and make facilities accessible. 28 C.F.R. § 35.150(d). The regulations prescribe in detail what the transition plan must include, and mandate that the transition plan be completed by July 26, 1992. Id. Any structural changes undertaken pursuant to the plan were to have been completed by January 26, 1995.

Id. § 35.150(c). The BPT did not prepare a transition plan until October 24, 1997. The transition plan that the BPT developed is inadequate. The transition plan failed to identify methods of removing physical barriers and providing program access and to identify necessary structural changes. The BPT cannot create an effective transition plan in part because the BPT has not yet conducted a complete self-evaluation.

E. Notice and Grievance Procedure

1. Notice of the ADA's Protections

The regulations implementing the ADA require that the BPT give notice of the ADA and the protections available under the ADA to prisoners and parolees. 28 C.F.R. § 35.106. This requirement was effective January 26, 1992, when the Act itself became applicable to public entities. It is undisputed that the BPT violated this provision b not providing any notice until October 24, 1997 at the earliest, more than five years after it was obliged to do so, and only after this lawsuit was filed. Further, because Defendants have failed to communicate effectively their written forms to prisoners and parolees, Defendants' belated notice is insufficient to apprise prisoners and parolees of the ADA's "applicability to the services, programs, or activities" of the BPT or to "apprise such persons of the protections against discrimination assured them by" the ADA. 28 C.F.R. § 35.106.

2. Grievance Procedure

The regulations implementing the ADA require that Defendants "adopt and publish grievance procedures providing for prompt and equitable resolution of complaints alleging any action that would be prohibited by this part." 28 C.F.R. § 35.107(b). The Court concludes, based on a thorough review of the facts, that Defendants' appeal process, which is the only means by which prisoners and parolees can make ADA-related complaints, does not adequately provide prompt and equitable

resolution of complaints under the ADA. The BPT's "one appeal" rule requires that prisoners and parolees delay making ADA-related grievances until the conclusion of the hearing on the merits; if a prisoner or parolee immediately appeals a denial of a request for an accommodation, any subsequent appeal on the merits would be procedurally barred. This violates § 35.107(b)'s requirement that complaints be resolved promptly. Furthermore, the evidence demonstrates that the BPT also fails reasonably to accommodate class members during the appeals process itself, which violates § 35.107(b)'s requirement that complaints be resolved equitably.

F. No Evidence of Undue Burden or Fundamental Alteration

The regulations implementing Title II of the ADA with respect to existing facilities do not require public agencies to take actions they "can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." 28 C.F.R. §§ 35.150(a)(3) & 35.164. The burden of proving that a change would result in fundamental alteration or undue burden is on the public entity. Id. Moreover, any decision that compliance with the ADA would create an undue burden or fundamental alteration must be made by the head of the public agency and "accompanied by a written statement of the reasons for reaching that conclusion." Id.

In this case, Defendants did not present a viable defense under these provisions. Defendants did not attempt to demonstrate that bringing the BPT's facilities into compliance would present an undue burden, nor did they argue that compliance would require a fundamental change in the BPT's programs. Defendants also did not present any evidence that the BPT's programs. Defendants also did not present any evidence that the BPT had ever come to that conclusion, nor did they provide any evidence that the BPT had created a written statement of reasons that would support such a conclusion.

G. No Release from Liability By Use of CDC Facilities and Staff

Defendants cannot avoid ADA and Section 504 liability by delegating responsibility for their delivery of programs, services and activities, or for the facilities in which they provide these programs, to the CDC or any other entity. The implementing regulations of both the ADA and Section 504 prohibit covered entities from discriminating against individuals with disabilities "directly or through contractual, licensing, or other arrangements." 28 C.F.R. § 35.130(b)(1) (ADA); 28 C.F.R. § 41.51(b) (Section 504). The BPT is thus legally obliged to ensure non-discrimination wherever programs, services or activities are provided to Plaintiff class members. Additionally, the BPT cannot avoid liability for violations of the physical accessibility standards by holding its programs in locations under the control of other entities. See Tyler, 857 F. Supp. at 816 (city could not omit building from its ADA self-evaluation merely because it did not own the building).

Under the law, the BPT has an obligation to ensure that disabled inmates are provided reasonable accommodations to allow them to participate in BPT programs. This includes an obligation to ensure that disabled inmates are accommodated so that they have notice of their rights and understand BPT proceedings. The BPT remains liable for actions of CDC employees to whom the BPT delegates responsibility for BPT programs and services. The rights of disabled persons would be eviscerated if public entities could avoid the mandate of the ADA and Section 504 simply by contracting out their services or arranging with independent entities to provide them.

Furthermore, the BPT exercises sufficient control over the CDC Hearing Agents to be liable for their actions. See Morse v. Regents of the Univ. of Colo., 154 F.3d 1124, 1128 (10th Cir. 1998) (University exercised sufficient control over ROTC to be liable for its actions). The BPT is responsible for the preparation of the Guidelines that specify the actions the CDC

Hearing Agents are to take with respect to BPT proceedings. See Ex. P-52 at BPT 637. Deviation from the Guidelines requires BPT approval. See id. The BPT authored the forms that are completed by Hearing Agents and inmates. In addition, Defendants Davis and Presley directly supervise and control the CDC, which is an agency within YACA.

H. No Release From Liability Based on Substantial Compliance

Relief is not precluded by Defendants' claimed substantial compliance with the ADA and Section 504. First, based on a thorough review of the record, the Court concludes that Defendants' policies and programs, when viewed in their entirety, are not substantially in compliance with the ADA and Section 504. Second, even if Defendants were in substantial compliance, that would not be a defense.

In Withrow v. Concannon, 942 F.2d 1385 (9th Cir. 1991), the Ninth Circuit held that substantial compliance with the regulations implementing the Aid to Families with Dependent Children, Food Stamp and Medicaid programs was not sufficient to preclude the award of injunctive relief. "An injunction requiring adherence to the regulations . . . imposes no inappropriate obligation on the state. . . . The fact that absolutely perfect compliance is unattainable does not of itself preclude an injunction requiring the state to comply with the regulations." Id. at 1388. "There is, however, doubtless a point at which any failure of total compliance is truly de minimis, where the state has come to comply 'as strictly as is humanly possible,' and it is within the discretion of the district court to deny injunctive relief." Id. (quoting Haskins v. Stanton, 794 F.2d 1273, 1277 (7th Cir. 1986)).

The duties imposed on Defendants by the ADA and Section 504 are no less mandatory than those imposed by the regulations at issue in Withrow. The regulations implementing the ADA and Section 504 state that Defendants' programs and

services must be accessible when viewed in their entirety. It does not further state that the measure of appropriate accessibility of those programs and services, viewed in their entirety, is substantial compliance. Defendants, who have not even established that they are in substantial compliance with the ADA and Section 504, certainly have not made a showing that they have complied with those statutes as strictly as is humanly possible, and thus do not fall within the de minimis exception set forth in Withrow.

II. Fourteenth Amendment

Defendants have denied Plaintiff class members their rights under the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

Liberty interests of prison inmates protected by the Fourteenth Amendment may arise from two sources: The Due Process Clause itself and the laws of the States. Hewitt v. Helms, 459 U.S. 460, 466 (1983); Board of Pardons v. Allen, 482 U.S. 369, 373 n.3 (1987); Olim v. Wakinekona, 461 U.S. 238, 249 (1983).

A deprivation of an inmate's liberty that goes beyond "the normal limits or range of custody which the conviction has authorized the State to impose" gives rise to protection by the Due Process Clause itself. Meachum v. Fano, 427 U.S. 215, 225 (1976); see also Vitek v. Jones, 445 U.S. 480, 493 (1980) (transfer to mental hospital implicates the Due Process Clause); Washington v. Harper, 494 U.S. 210, 221-22 (1990) (involuntary administration of psychotropic drugs implicates the Due Process Clause).

A deprivation that falls within the normal range of custody authorized by the conviction does not, in and of itself, implicate a protectible liberty interest. However, a State statute or regulation can create a right triggering due process protection. Wolff v. McDonald, 418 U.S. 539, 557 (1974); Meachum, 427

U.S. at 225-26. In Sandin v. Conner, 515 U.S. 472 (1995), the Supreme Court held that a statute or regulation creates such a right if it (1) limits the discretion of prison officials by imposing substantive criteria and (2) either imposes an atypical and significant hardship, relative to ordinary incidents of prison custody, or involves State action that will inevitably affect the duration of a sentence. See Jones v. Moran, 900 F. Supp. 1267, 1271-74 (N.D. Cal. 1995) (analyzing Sandin); Frazier v. Coughlin, 81 F.3d 313, 317 (2nd Cir. 1996); cf. Jacks v. Crabtree, 114 F.3d 983, 986 n.4 (9th Cir. 1997) (citing Sandin and rejecting a prisoner's due process claim both because the statute at issue used non-mandatory language and because the deprivation did not involved an atypical and significant hardship).

A. Screening Offers and Parole Revocation, Parole Revocation Extension and Parole Date Rescission Hearings

The Supreme Court has recognized a liberty interest for parolees subject to the parole revocation process. See Morrissey v. Brewer, 408 U.S. 471, 481-82 (1972). This liberty interest requires that certain minimal procedural protections be afforded to parolees. Id. at 488-89.

Parolees facing revocation of parole are entitled, among other things, to: written notice of the claimed violations of parole; disclosure of the evidence against them; an opportunity to be heard in person at the revocation hearing and to present witnesses and documentary evidence; confront and cross-examine adverse witnesses; and a written decision stating the evidence relied upon and reasons for revocation. Id. at 489. The State of California recognizes that these entitlements also apply to prisoners subject to parole date rescission hearings. See Cal. Penal Code § 3041.5.

Parolees facing revocation charges are also entitled to assistance of counsel where the parolees make such a request,

based on a timely and colorable claim that they did not commit the alleged parole violations, or where there are substantial justifying or mitigating factors concerning the parole violation and the reasons are complex or otherwise difficult to develop or present. Gagnon v. Scarpelli, 411 U.S. 778, 790-91 (1973). In determining whether counsel should be appointed, prison or parole authorities must take into account whether parolees are capable of speaking effectively for themselves. Id.

BPT regulations entitle prisoners to review non-confidential documents in their central files. Cal. Code Regs. Tit. 15 § 2247. In the context of life prisoner parole consideration hearings, the BPT admits that such a file review is a fundamental right under Morrissey and its progeny. RT at 817:17-22, 818:5-8 (Connolly).

Defendants are required to honor these due process rights for parole revocation hearings of disabled individuals in the State of California. Parole revocation extension hearings involve the same fundamental rights as parole revocation hearings; a decision adverse to a prisoner at a parole revocation extension hearing extends the sentence that was imposed after a parole revocation hearing. Parole date rescission hearings also involve these rights; a parole date rescission hearing is practically speaking a revocation of parole that occurs prior to release. Parole revocation extension and parole date rescission hearings thus also give rise to due process rights. Finally, because screening offers are a means by which prisoners or parolees can waive their right to parole revocation and revocation extension hearings, they too, implicate the Due Process Clause.

B. Parole Consideration and Serious Offender Hearings

In Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, the Supreme Court found that parole consideration hearings for prisoners sentenced to life terms gave rise to a liberty interest requiring that certain minimal due

process rights be observed. 442 U.S. 1 (1979) (finding existence of liberty interest for due process purposes where statutory parole scheme requires prisoner's release if certain requirements or factors are met). See also Board of Pardons v. Allen, 482 U.S. 369, 376 (1987); Bergen v. Spaulding, 881 F.2d 719, 721 (9th Cir. 1989) (State early release statutes can create a liberty interest protected by due process guarantees).

In Greenholtz, the Supreme Court held that due process required that life prisoners be afforded certain procedural protections at their parole consideration hearings, including the opportunity to be heard and the right to be notified of the reasons for a denial of parole. 442 U.S. at 15-16. The parole consideration statute in Greenholtz stated, "Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it shall order his release unless it is of the opinion that his release should be deferred because" of one of the four enumerated reasons. Id. at 11. The Supreme Court held that

> the expectancy of release provided in this statute is entitled to some measure of constitutional protection. However, we emphasize that this statute has unique structure and language and thus whether any other state statute provides a protectible entitlement must be decided on a case-by-case basis.

Id. at 12. The Ninth circuit subsequently concluded that "the unique 'shall/unless' formula fo the Nebraska statute was decisive in Greenholtz. No protected entitlement to release exists unless a state scheme includes that formula." Baumann v. Arizona Dep't of Corrections, 754 F.2d 841, 844 (9th Cir. 1985) (citation omitted).

California's statute includes this formula. Like the statutory parole scheme in Greenholtz, California's statutory parole scheme requires the hearing panel to set a release date for parole unless the panel determines that certain criteria have not been met:

> The panel or board shall set a release date unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of the current or past-convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed at this meeting.

Cal. Penal Code § 3041(b) (emphasis added).

Greenholtz and Baumann both predate Sandin's cautionary statements about focusing excessively on the use of mandatory language. However, because parole consideration hearings also inevitably affect the duration of a sentence, State parole consideration statutes that include the "shall/unless" formula create a liberty interest of "real substance," and thus implicate the Due Process Clause. See Sandin, 515 U.S. at 483-84; Wolff, 418 U.S. at 557.[12/]

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12. Even were the Court not convinced that parole consideration hearings concern a matter of "real substance," Greenholtz is nonetheless binding authority. The Supreme Court discussed Greenholtz in Sandin. Sandin, 515 U.S. at 479-80. However, the Court did not overrule Greenholtz. Id. at 483 n.5 ("Such abandonment of Hewitt's methodology does not technically require us to overrule any holding of this Court"). Where a Supreme Court precedent "has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [lower courts] should follow the case which directly controls, leaving to [the Supreme Court] the prerogative of overruling its own decisions." Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989). Greenholtz directly applies to the instant case. See also Ellis v. District of Columbia, 84 F.3d 1413, 1418 (D.C. Cir 1996) (reaching the same

Serious offender hearings also require due process. For due process purposes, the Ninth Circuit has equated serious offender hearings under California Law to parole consideration hearings. See Lambdin v. Superintendent, 640 F.2d 245, 247 (9th Cir. 1981).

C. Mentally Disordered Prisoner Hearings and Sexually Violent Predator Hearings

The "involuntary commitment [of an inmate] to a mental hospital is not within the range of conditions of confinement to which a prison sentence subjects an individual." Vitek, 445 U.S. at 493. The decision to make such a transfer triggers the protections of the Due Process Clause. Id. The BPT conducts mentally disordered prisoner hearings and sexually violent predator probable cause hearings in order to determine if prisoners should be committed to a psychiatric institution upon parole. See Cal. Penal Code §§ 2960-2981 (mentally disordered prisoners); Cal. Welf. & Inst. Code §§ 6600-6605 (sexually violent predators). Where a liberty interest triggers due process concerns, probable cause hearings related to that interest require due process. See Gagnon, 411 U.S. at 786 (probable cause hearing for parole revocation requires due process). These hearings therefore require due process.

D. Defendants Have Violated the Due Process Clause

Defendants have denied Plaintiff class members their due process rights. The Court concludes, based on a thorough review of the evidence, that Plaintiff class members have received deficient notice, unknowingly waived important rights and been subject to fundamentally unfair procedures from the moment of initial notice until the conclusion of appeal. Likewise, Plaintiff class members have been denied their right

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conclusion after analyzing Sandin and Greenholtz).

to assistance of counsel when such assistance is constitutionally required.

Defendants lack adequate procedures for identifying individuals with disabilities, have not accommodated prisoners and parolees with known disabilities, and have failed to modify policies and procedures in a manner sufficient to comport with due process. Because of this, many Plaintiff class members have been denied their fundamental right to be heard in a meaningful manner. Mathews v. Eldridge, 424 U.S. 319, 333 (1976).

III. Remedy

Plaintiffs have proven that Defendants have engaged in ongoing, extensive, system-wide violations of the ADA, Section 504 and the Constitution. The scope of relief is dictated by the extent of the violation established; systemic injunctive relief in this case is therefore justified. Lewis v. Casey, 518 U.S. 343, 359-60 (1996). In the Eighth Amendment context, courts evaluate defendants' attitudes at the time the suit was filed, during the litigation and "into the future," in determining what relief is appropriate. See Farmer v. Brennan, 511 U.S. 825, 845-46 (1994); Madrid v. Gomez, 889 F. Supp. 1146, 1281 (N.D. Cal. 1995). It is appropriate for a court to consider defendants' refusals to remedy violations of law even after the violations were brought to their attention. Hutto v. Finley, 437 U.S. 678, 687 (1978); Toussaint v. McCarthy, 801 F.2d 1080, 1087 (9th Cir. 1986); Madrid, 889 F. Supp. at 1281. The Court has noted Defendants' failure to recognize that they have obligations under the ADA, failure to meet those obligations, failure to admit that they have not met those obligations and failure to acknowledge that their actions caused actual and wide-spread harm to the individual Plaintiffs and the Plaintiff class as a whole. However, the Court would conclude that injunctive relief is necessary even if the Court had not made this finding.

In fashioning a remedy, the court has a duty to order effective relief. Toussaint, 801 F.2d at 1087. This duty requires the court to ensure that the rights of plaintiffs are fully vindicated. Madrid, 889 F. Supp. at 1282. Although an injunction must be narrowly tailored to correct the specific constitutional and statutory violations at issue, federal courts have broad equitable powers to formulate appropriate relief. Stone v. City and County of San Francisco, 968 F.2d 850, 861 (9th Cir. 1992); Hoptowit v. Ray, 682 F.2d 1237, 1245 (9th Cir. 1982); Madrid, 889 F. Supp. at 1280.

Where such relief is necessary to remedy a constitutional violation, "a federal court may order relief that the Constitution would not of its own force initially require." Toussaint, 801 F.2d at 1087; see also North Carolina State Bd. Of Educ. v. Swann, 402 U.S. 43, 46 (1971) ("all reasonable methods [are] available to formulate an effective remedy"). For example, in Gluth v. Kangas, 951 F.2d 1504, 1510 (9th Cir. 1991), the district court ordered the Arizona Department of Corrections to supply prisoners with typing supplies, file folders and brief covers and bindings. The Ninth Circuit approved of this remedy, while noting that it did "not by any means suggest that such supplies are constitutionally required." Id. at 1510 n.4. Similarly, in the areas of mental health and medical care, courts that have not specifically found a lack of quality assurance to be of constitutional dimension have nevertheless ordered quality assurance as a remedial measure. See Coleman v. Wilson, 912 F. Supp. 1282, 1308 (E.D. Cal. 1995) (mental health); Madrid, 889 F. Supp. at 1258 (medical care); Grubbs v. Bradley, 821 F. Supp. 496, 500 (M.D. Tenn. 1993) (medical care); Newman v. Alabama, 349 F. Supp. 278, 288 (M.D. Ala. 1972) (medical care), aff'd in part, 503 F.2d 1320 (5th Cir. 1974) (affirming on the merits), vacated in part, 522 F.2d 71 (5th Cir. 1975) (en banc) (vacating award of attorneys' fees and costs and remanding for further consideration).

Appropriate relief can include an injunction requiring the creation and maintenance of a training program. See, e.g.,

LaMarca v. Turner, 995 F.2d 1526, 1544 (11th Cir. 1993) (affirming portion of injunction requiring that prison guards and psychiatric staff receive "special training" on rape counseling to prevent Eighth Amendment violations through continuing "deliberate indifference to a serious medical need"); Eng v. Smith, 849 F.2d 80, 81 (2d Cir. 1988) (affirming grant of preliminary injunction requiring, inter alia, proper mental health training of prison guards). Extensive evidence in this case shows that compliance with Title II of the ADA, Section 504 and the Due Process Clause cannot be achieved unless BPT staff, and persons to whom they delegate their responsibilities, receive appropriate training in identifying and accommodating prisoners and parolees with disabilities. Thus, the relief ordered in this case shall include the creation and maintenance of an appropriate training program.

Appropriate relief may also include a systematic program by which disabilities are identified. Federal courts have required prison systems to identify mentally ill inmates as part of a comprehensive remedial plan. See Coleman, 912 F. Supp. at 1305 (quoting Ball v. Idaho Bd. of Corrections, 595 F. Supp. 1558, 1577 (D. Idaho 1984) for the proposition that the defendant must create a "systemic program for screening and evaluating inmates in order to identify those who require mental health treatment"); see also Madrid, 889 F. Supp. at 1256-57; Casey v. Lewis, 834 F. Supp. 1477, 1553 (D. Ariz. 1993). Federal courts have also required prison systems to identify populations of the mentally retarded, elderly and physically disabled to remedy systemic violations of federal law. See Pugh v. Locke, 406 F. Supp. 318, 333 (D. Ala. 1976), aff'd with modifications sub nom. Newman v. Pugh, 559 F.2d 283 (5th Cir. 1977) (modifying other aspects of injunctive order), cert. granted in part and judgment rev'd in part sub nom. Alabama v. Pugh, 438 U.S. 781 (1978) (dismissing two defendants on Eleventh Amendment grounds); Laaman v. Helgemoe, 437 F. Supp. 269, 290, 328-29 (D. N.H. 1977). In the instant case, the evidence establishes that, absent a program to identify those with disabilities, many class members will be denied their rights

under the Due Process Clause to be heard in meaningful manner. Mathews, 424 U.S. at 333. To remedy this constitutional violation, the relief ordered will require Defendants to develop an appropriate program to ensure that prisoners' and parolees' disabilities are identified prior to hearings that require due process.

The foregoing, well-established principles are consistent with the Prison Litigation Reform Act of 1996 (PLRA). In civil actions concerning prison conditions, the PLRA requires that "the court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626 (a)(1)(A). A parallel provision of the PLRA states, "In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation." Id. § 3626(b)(1)(B)(2).

Discussing the latter provision, the Second Circuit concluded that the PLRA "removes only the discretionary power of the federal courts to afford relief through consent decrees over and above what they could award after a litigated judgment concerning federal rights." Benjamin v. Jacobsen, 124 F.3d 162, 170 (2d Cir. 1997). The first provision, which includes identical constraints on the remedies courts can impose, must be interpreted in the same manner. In the context of a litigated judgment, §3626(a)(1)(A) does not impose any limitations, beyond those that existed prior to the enacting of the PLRA, on the Court's power to order injunctive relief. See also Smith v. Arkansas Dep't of Corrections, 103 F.3d 637, 647 (8th Cir. 1996) (PLRA "merely codifies existing law").

The Court is mindful of the fact that, once constitutional and statutory violations have been found, an equitable remedy must accord appropriate deference to Defendants' policy preferences and interest in running their own programs unless doing so would preclude an effective remedy. Madrid, 889 F. Supp. at 1282; see also Toussaint, 801 F.2d at 1087; Hoptowit, 682 F.2d at 1254. Thus, Defendants should receive an opportunity to develop the methods for eliminating those violations. Lewis, 518 U.S. at 362-363; see also Hutto, 437 U.S. at 687 n. 9; Toussaint, 801 F.2d at 1086. However, the court will not approve of any remedial plan that fails to provide an effective remedy that fully vindicates Plaintiffs' rights under the ADA and the Constitution.

Considering all of the above, the Court concludes that injunctive relief is necessary and appropriate to ensure an effective remedy of the constitutional and statutory violations found here. See Madrid, 889 F. Supp. at 1280-81. The Court further concludes that, because of Defendants' repeated failure, prior to this lawsuit and during its litigation, to demonstrate an ability to conceive of an appropriate plan to comply with the ADA, Section 504 and the Due Process Clause, it is necessary that the Court provide Defendants with greater guidance than might be needed in the usual case. In Hutto, the Supreme Court concluded that, in light of the defendants' repeated failure to remedy prison conditions that violated the Eighth amendment, "the District Court had ample authority to go beyond earlier orders and to address each element contributing to the violation. . . . [T]aking the long and unhappy history of the litigation into account, the court was justified in entering a comprehensive order to insure against the risk of inadequate compliance." 437 U.S. at 687. In the instant case, Defendants failed timely to conduct a statutorily required self-evaluation and draft an adequate transition plan and demonstrated at trial that they are still in utter denial of the scope of the violations of Plaintiff class members' statutory and constitutional rights.

In light of the violations established and Defendants' past conduct, the Court therefore concludes that the injunctive order filed today is narrowly drawn, extends no further than necessary to correct defendants' violations of the federal rights of the Plaintiff class and is the least intrusive means necessary to correct those violations. The Court also concludes that this injunction has no adverse impact on public safety or the operation of the criminal justice system.

Finally, a prevailing plaintiff in an action brought under the ADA, Section 504 or 42 U.S.C. § 1983 is entitled to an award of attorneys' fees and expenses. 42 U.S.C. § 12205; 29 U.S.C. § 794a(b); 42 U.S.C. §1988. The Court concludes that Plaintiffs are the prevailing party and therefore are entitled to reasonable attorneys' fees, including litigation expenses and costs, in an amount to be determined at a later date.

Dated: DEC 22 1999

/s/ CLAUDIA WILKEN
CLAUDIA WILKEN
United States District Judge

Copies mailed to counsel
as noted on the following page

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOHN ARMSTRONG, et al.,

Plaintiffs,

v.

GRAY DAVIS, et al.,

Defendants.

/

NO. C-94-2307 CW

JUDGMENT

This action came on for trial before the Court, the Honorable Claudia Wilken, United States District Judge, presiding, and the issues having been duly tried and the Court having duly rendered its decision set forth in the Findings of Fact and Conclusion of Law filed December 22, 1999,

IT IS HEREBY ORDERED AND ADJUDGED:

That judgment is entered in favor of Plaintiffs as set forth in the attached Permanent Injunction. Plaintiffs shall recover of Defendants their costs of action.

Dated: DEC 22 1999

/s/ Claudia Wilken
CLAUDIA WILKEN
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOHN ARMSTRONG, et al.,

Plaintiffs,

v.

GRAY DAVIS, et al.,

Defendants.

/

NO. C 94-02307 CW

PERMANENT INJUNCTION

Based on the Findings of Fact and Conclusions of Law filed herewith, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

Defendants Gray Davis, as Governor of the State of California, Robert Presley, as Secretary to the California Youth and Adult Corrections Agency, James Nielsen, as Chairman of the California Board of Prison Terms (BPT), and the BPT, and their agents, employees, successors in office and all persons acting in their aid or in participation with them are advised, enjoined and ordered as follows:

A. Introduction

1. Terms not expressly defined in this injunction shall have the meaning given to them by Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12131 et seq., and its implementing regulations, or if no meaning is provided therein, the meaning given to them by Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulations. Where no definition is provided by

the ADA, Section 504 or their implementing regulations, terms shall be construed in accordance with ordinary principles of law, and particularly with reference to the record in this case.

2. "Prisoners and parolees with disabilities" refers to all current and future California State prisoners and parolees with mobility, hearing or sight impairments, or with developmental or learning disabilities, that substantially limit a major life activity.

3. "Parole proceedings" shall mean all hearings conducted by the BPT to determine whether and/or when a prisoner or parolee should be released on parole or involuntarily confined, including parole revocation and revocation extension hearings, life prisoner hearings (documentation hearings, progress hearings, parole consideration hearings, parole date rescission hearings and parole board rules hearings), mentally disordered offender hearings and sexually violent predator hearings. Parole proceedings also include any events related to the hearings that occur prior to or after the hearings, including, but not limited to, screening offers, psychological evaluations, central file reviews and administrative appeals.

B. Self-Evaluation and Transition Plan

4. Within ninety days of the date of this injunction, the BPT shall evaluate, pursuant to 28 C.F.R. § 35.105, all of the facilities in which parole proceedings are conducted to determine whether each facility complies with the ADA and its implementing regulations. The analysis shall not be limited to facilities owned and operated by the BPT, but shall include all facilities in which parole proceedings are conducted. The evaluation shall include:

a. An accessibility survey of all parole facilities for which a complete accessibility survey has not been conducted.

The accessibility survey need not duplicate the surveys of other governmental entities as long as the BPT takes reasonable steps to ensure that such surveys are accurate and reliable.

b. An analysis of the accessibility of each parole facility.

5. Immediately following its analysis of these facilities, the BPT shall provide to all relevant BPT and California Department of Corrections (CDC) personnel a list of the facilities that are not fully accessible. The list shall describe those parts of the facility that are not accessible and the disabilities that the facility cannot accommodate. Updated lists shall be distributed as changes occur.

6. The BPT shall thereafter draft a Transition Plan pursuant to 28 C.F.R. § 35.150(d). The Transition Plan must include the following:

a. For each facility in which parole proceedings are conducted, a description of any structural modifications that will be completed to make the parole proceedings conducted at that facility accessible or another accessible location in which the proceedings will be held.

b. A schedule for providing accessible proceedings for prisoners and parolees with disabilities at each facility, or at another, accessible location, as expeditiously as possible, but no later than sixty days after the Transition Plan is submitted.

7. Parole revocation hearings shall be conducted at a location within fifty miles of the alleged violation that is readily accessible to and usable by parolees with disabilities.

8. Postponement of a parole proceeding due to the inaccessibility of a facility is not an acceptable alternative, except in extraordinary circumstances.

9. Within 150 days of the date of this injunction, Defendants shall submit their Transition Plan to Plaintiffs' counsel. Plaintiffs shall thereafter have thirty days to submit written comments and the parties shall negotiate in good faith to resolve any disagreements. If any disputes remain, Plaintiffs shall file a regularly noticed motion regarding the disputed issues within 210 days of the date of this injunction.

C. Policies and Procedures

10. The BPT shall develop and implement sufficiently specific policies and procedures that will ensure continuous compliance with all of the requirements of this injunction. Among other things, the policies and procedures will ensure that prisoners and parolees with disabilities are able to participate, to the best of their abilities, in any parole proceedings.

11. The policies shall include detailed procedures for identifying prisoners and parolees with disabilities prior to or at the initiation of any parole proceeding.

12. The policies shall include detailed procedures for accommodating and effectively communicating with prisoners and parolees with disabilities at all parole proceedings.

13. A draft of the policies and procedures required by the preceding paragraph shall be submitted to Plaintiffs' counsel within sixty days of the date of this injunction. Plaintiffs shall thereafter have thirty days to submit written comments on the policies and procedures, and the parties shall negotiate in good faith to resolve any differences. If any disputes remain, Plaintiffs shall file a regularly noticed motion regarding the disputed issues within 150 days of the date of this injunction. The briefing of any such motion shall be consolidated with the briefing of any motions filed pursuant to paragraphs 21 and 23.

D. Training

14. Within 120 days of the date of this injunction, all BPT Commissioners, BPT Deputy Commissioners, BPT executive officers, BPT ADA coordinators, BPT appeals analysts, CDC District Hearing Agents, CDC correctional counselors and other BPT and CDC personnel who have direct or supervisory responsibility for communicating with or making decisions affecting prisoners and parolees in connection with parole proceedings shall receive adequate training in the general requirements of Title II of the ADA, disability awareness, the appropriate method of determining whether a prisoner with a disability adequately understands written and verbal communications, the circumstances that gave rise to this injunction, its requirements and the BPT's policies and procedures developed pursuant to this injunction that are relevant to the individual's responsibilities.

E. Identification and Accommodation

15. The BPT shall create and maintain a system for tracking prisoners and parolees that the BPT identifies as having disabilities.

16. Prior to meeting with a prisoner or parolee about a screening offer, and prior to parole revocation, parole revocation extension, life prisoner parole date rescission, life prisoner parole consideration, serious offender, mentally disordered prisoner or sexually violent predator probable cause hearings, the BPT shall take reasonable steps to identify prisoners and parolees with disabilities. Such steps shall include, but not be limited to:

a. Checking the system described in paragraph 15 to determine whether the BPT has previously identified the prisoner or parolee as having a disability.

b. Reviewing all relevant and reasonably available information in the prisoner or parolee's central and medical files.

c. Verifying the disability when the BPT disputes the extent or existence of the disability. The prisoner or parolee shall be expected to cooperate with all verification efforts, but the BPT shall be responsible for verifying the disability.

17. The BPT shall provide accommodations to prisoners and parolees with disabilities at all parole proceedings. The prisoner or parolee's request for a particular type of accommodation shall be given primary consideration and shall be granted unless the request is unreasonable for specific, articulated reasons allowable under the ADA, or unless other effective accommodations are available.

18. The BPT shall hire at least one full-time ADA coordinator with expertise in Title II of the ADA, the identification of people with disabilities and the needs of people with disabilities, and shall ensure that this person is generally available during normal business hours to answer questions from and provide advice to District Hearing Agents and other BPT and CDC personnel. This person shall not be given duties that are not related to ADA compliance. If the BPT determines that employing a full-time ADA coordinator is unnecessary, it may seek relief from the Court byway of a regularly noticed motion, but in no event shall it file such a motion until the newly hired ADA coordinator has been employed for at least one year. The BPT shall bear the burden of demonstrating that other staffing methods are sufficient to ensure compliance with this injunction.

F. Forms

19. All BPT forms used by prisoners and parolees shall be revised so that they are written in simple English. Whenever prisoners or parolees with disabilities are given BPT forms that

they cannot understand due to their disabilities, they shall be provided an accommodation to enable them to understand the forms to the best of their abilities.

20. All BPT forms provided to prisoners and parolees shall be readily available in alternative formats, including, but not limited to, large print, Braille and audio tape.

21. All revisions to forms required by this injunction shall be submitted to Plaintiffs' counsel within sixty days of the date of this injunction. Plaintiffs shall thereafter have thirty days to submit written comments and the parties shall negotiate in good faith to resolve any disagreements. If any disputes remain, Plaintiffs shall file a regularly noticed motion regarding the disputed issues within 150 days of the date of this injunction. The briefing of any such motion shall be consolidated with the briefing of any motions filed pursuant to paragraphs 13 and 23.

G. Equipment

22. The BPT shall ensure that appropriate equipment is available to prisoners and parolees who need such equipment to communicate effectively at parole proceedings. Such equipment shall include, but not be limited to, assistive listening devices, computer readers and magnification devices.

23. The BPT shall provide Plaintiffs' counsel with a list of the available equipment and the places it is available within sixty days of the date of this injunction. Plaintiffs shall have thirty days to submit written comments and the parties shall negotiate in good faith to resolve any disagreements. If any disputes remain, Plaintiffs shall file a regularly noticed motion regarding the disputed issues within 150 days of the date of this injunction. The briefing of any such motion shall be consolidated with the briefing of any motions filed pursuant to paragraphs 13 and 21.

H. Screening Process

24. The screening offer, and all relevant BPT forms, police reports and other written documents, shall be effectively communicated to prisoners or parolees with disabilities at least seventy-two hours in advance of the time at which they must decide whether to exercise any of their rights, including the right to request an attorney, and to accept or reject the screening offer.

25. Prisoners and parolees with disabilities shall be provided an accommodation at the screening process when that is necessary to ensure that the prisoner or parolee understands to the best of his or her ability all of his or her rights, the nature of the charges and the consequences of waiving any rights. Before a prisoner or parolee with a disability may waive a parole hearing or the right to an attorney, the BPT must determine that the waiver is knowing and intelligent.

26. When necessary to achieve effective communication, appropriate auxiliary aids or assistance must be provided to prisoners and parolees during the screening process. Such aids and assistance shall include, but not be limited to, sign language interpreters, assistive listening devices, readers and persons trained to provide assistance to individuals with cognitive disabilities.

27. At its discretion, the BPT may appoint attorneys as an accommodation. In order to suffice as an accommodation, the attorneys must be adequately trained to provide accommodations to persons with disabilities and must receive adequate additional time for providing those services. Attorneys appointed to represent individuals with disabilities shall be informed of their clients' disabilities. If the BPT is aware that a prisoner or parolee requires certain specific accommodations,

the BPT shall either instruct an attorney appointed to represent that prisoner or parolee to provide those specific accommodations, or shall provide the prisoner or parolee with those specific accommodations by some other means.

28. In lieu of providing assistance at the screening process, the BPT may refer the prisoner or parolee for a hearing with the necessary aids or assistance, provided that, absent any additional charges, the hearing is within thirty days of the parole hold and that any term of imprisonment imposed at a hearing does not exceed a typical screening offer for a similar violation.

I. Hearings

29. At its hearings, the BPT shall make accommodations for prisoners and parolees with disabilities and provide appropriate auxiliary aids and services necessary for effective communication. Such accommodations and auxiliary aids and services shall include, but not be limited to, sign language interpreters, assistive listening devices, readers and individuals trained to provide assistance to persons with disabilities.

30. At its discretion, the BPT may appoint attorneys as an accommodation. In order to suffice as an accommodation, the attorneys must be adequately trained to provide accommodations to persons with disabilities and must receive adequate additional time for providing those services. Attorneys appointed to represent individuals with disabilities shall be informed of their clients' disabilities. If the BPT is aware that a prisoner or parolee requires certain specific accommodations, the BPT shall either instruct an attorney appointed to represent that prisoner or parolee to provide those specific accommodations, or shall provide the prisoner or parolee with those specific accommodations by some other means.

31. Hearing impaired prisoners and parolees who need sign language interpreters shall not have their hands and arms restrained in any way during the hearing, unless a written

determination is made on an individualized basis that the prisoner or parolee would pose a direct threat if unrestrained and that there are no other reasonable alternatives available to protect against the threat. The Chairman of the BPT or his delegate shall personally approve the use of restraints in each such instance prior to their use.

32. The BPT shall make accommodations for prisoners and parolees with disabilities in order to assist them in preparing for parole proceedings. For example, if a prisoner or parolee is entitled to review his or her central file prior to a parole proceeding, and if that prisoner or parolee is unable, due to a disability, adequately to review his or her central file without an accommodation, the BPT shall make such an accommodation. Where other preparation, including but not limited to participating in psychological interviews, obtaining letters of support and developing parole plans, is necessary prior to a parole proceeding, the BPT shall provide reasonable accommodations to prisoners or parolees with disabilities who require such accommodations adequately to complete such preparation.

J. Appeals

33. Prisoners and parolees with disabilities who cannot use or understand the appeal process or prepare an appeal themselves by reason of their disability shall be provided with effective assistance in preparing a BPT appeal.

K. Grievances

34. The BPT shall develop and implement a grievance procedure, separate from its current appeal procedure, for processing any complaints of denials of requests for accommodations. All grievances requesting reasonable accommodations at a scheduled hearing shall be decided before the hearing.

35. All administrative appeals alleging in substance violations of the ADA or its implementing regulations shall be treated as ADA grievances, and any successive appeal on the non-ADA merits of a decision shall not be deemed barred due to the filing of the ADA-related grievance or grievances. Except as otherwise provided in the immediately preceding paragraph, all such ADA-related appeals shall be decided within thirty days of the BPT's receipt of the appeal form.

L. Programs

36. The BPT shall provide to all Commissioners and Deputy Commissioners who participate in life prisoner parole consideration hearings a list of CDC programs in which prisoners with disabilities can meaningfully participate, either without accommodation or with appropriate and readily available accommodation. This list shall specify the types of programs available, the particular disabilities the programs can accommodate and the prisons in which they are offered. This list shall be updated every six months.

37. At life prisoner parole consideration hearings, the BPT shall not recommend that prisoners participate in programs that are unavailable to them by reason of their disabilities and shall not rely on the failure of prisoners to participate in programs not available to them by reason of their disabilities as a factor supporting denial of a parole date or a multi-year denial.

38. Nothing in this section shall require the BPT to release a prisoner on parole who is otherwise unsuitable for release under California law.

M. Monitoring

39. The parties shall attempt negotiate a plan to monitor Defendants' compliance with this injunction. If such negotiations are unsuccessful, the Court shall consider the appointment of a Special Master. Within forty-five days of the

date of this injunction, the parties shall file a joint and mutually acceptable plan for monitoring this injunction or separate briefs describing each party's position on the need for a Special Master and the Court's authority to appoint one.

N. Enforcement

40. The Court shall retain jurisdiction to enforce the terms of this injunction.

41. No person who has notice of this injunction shall fail to comply with it, nor shall any person subvert the injunction by any sham, indirection or other artifice.

IT IS SO ORDERED.

Dated: [file stamp Dec. 22, 1999]

/s/ Claudia Wilken
CLAUDIA WILKEN
United States District Judge

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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN OF CALIFORNIA

JOHN ARMSTRONG, et al. Plaintiffs, v. GRAY DAVIS, et al., Defendants.	No. C-94-2307-CW STIPULATION AND ORDER ON REVISED INJUNCTION

Pursuant to the Court's Order of January 29, 2002, the parties have met and conferred regarding a revision of the Permanent Injunction issued in this case in order to meet the requirements stated by the Ninth Circuit in *Armstrong v. Davis*, 275 F.3d 849 (9th Cir. 2001).

The parties stipulate that the attached Revised Permanent Injunction meets the Ninth Circuit's requirements.

IT IS SO STIPULATED.

Dated: February 5, 2002

/s/ Sara Norman
SARA NORMAN
Attorney for plaintiffs

Dated: February 6, 2002

/s/ Frances Grunder
FRANCES GRUNDER
Attorney for defendants

IT IS SO ORDERED.

Dated: FEB 11 2002

/s/ Claudia Wilken
CLAUDIA WILKEN
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOHN ARMSTRONG, et al., NO. C 94-02307 CW

Plaintiffs,

v.

REVISED PERMANENT INJUNCTION

GRAY DAVIS, et al.,

Defendants.

/

Based on the Findings of Fact and Conclusions of Law filed herewith, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

Defendants Gray Davis, as Governor of the State of California, Robert Presley, as Secretary to the California Youth and Adult Corrections Agency, James Nielsen, as Chairman of the California Board of Prison Terms (BPT), and the BPT, and their agents, employees, successors in office and all persons acting in their aid or in participation with them are advised, enjoined and ordered as follows:

A. Introduction

1. Terms not expressly defined in this injunction shall have the meaning given to them by Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12131 et seq., and its implementing regulations, or if no meaning is provided therein, the meaning given to them by Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulations. Where no definition is provided by the ADA, Section 504 or their implementing

regulations, terms shall be construed in accordance with ordinary principles of law, and particularly with reference to the record in this case.

2. "Prisoners and parolees with disabilities" refers to all current and future California State prisoners and parolees with mobility, hearing or sight impairments, or with developmental or learning disabilities, that substantially limit a major life activity.

3. "Parole proceedings" shall mean all hearings conducted by the BPT to determine whether and/or when a prisoner or parolee should be released on parole or involuntarily confined, including parole revocation and revocation extension hearings, life prisoner hearings (documentation hearings, progress hearings, parole consideration hearings, parole date rescission hearings and parole board rules hearings), mentally disordered offender hearings and sexually violent predator hearings. Parole proceedings also include any events related to the hearings that occur prior to or after the hearings, including, but not limited to, screening offers, psychological evaluations, central file reviews and administrative appeals.

B. Self-Evaluation and Transition Plan

4. Within ninety days of the date of this injunction, the BPT shall evaluate, pursuant to 28 C.F.R. § 35.105, all of the facilities in which parole proceedings are conducted to determine whether each facility complies with the ADA and its implementing regulations. The analysis shall not be limited to facilities owned and operated by the BPT, but shall include all facilities in which parole proceedings are conducted. The evaluation shall include:

a. An accessibility survey of all parole facilities for which a complete accessibility survey has not been conducted. The accessibility survey need not duplicate the surveys of other governmental entities as long as the BPT takes

reasonable steps to ensure that such surveys are accurate and reliable.

b. An analysis of the accessibility of each parole facility.

5. Immediately following its analysis of these facilities, the BPT shall provide to all relevant BPT and California Department of Corrections (CDC) personnel a list of the facilities that are not fully accessible. The list shall describe those parts of the facility that are not accessible and the disabilities that the facility cannot accommodate. Updated lists shall be distributed as changes occur.

6. The BPT shall thereafter draft a Transition Plan pursuant to 28 C.F.R. § 35.150(d). The Transition Plan must include the following:

a. For each facility in which parole proceedings are conducted, a description of any structural modifications that will be completed to make the parole proceedings conducted at that facility accessible or another accessible location in which the proceedings will be held.

b. A schedule for providing accessible proceedings for prisoners and parolees with disabilities at each facility, or at another, accessible location, as expeditiously as possible, but no later than sixty days after the Transition Plan is submitted. These provisions require only that the BPT request that the CDC transport mobility impaired prisoners to accessible locations if the facilities at which they are housed are inadequate. The CDC may, for valid security or other penological reasons, decline to do so.

7. Parole revocation hearings shall be conducted at a location within fifty miles of the alleged violation that is readily accessible to and usable by parolees with disabilities.

8. Postponement of a parole proceeding due to the inaccessibility of a facility is not an acceptable alternative, except in extraordinary circumstances.

9. Within 150 days of the date of this injunction, Defendants shall submit their Transition Plan to Plaintiffs' counsel. Plaintiffs shall thereafter have thirty days to submit written comments and the parties shall negotiate in good faith to resolve any disagreements. If any disputes remain, Plaintiffs shall file a regularly noticed motion regarding the disputed issues within 210 days of the date of this injunction.

C. Policies and Procedures

10. The BPT shall develop and implement sufficiently specific policies and procedures that will ensure continuous compliance with all of the requirements of this injunction. Among other things, the policies and procedures will ensure that prisoners and parolees with disabilities are able to participate, to the best of their abilities, in any parole proceedings.

11. The policies shall include detailed procedures for identifying prisoners and parolees with disabilities prior to or at the initiation of any parole proceeding.

12. The policies shall include detailed procedures for accommodating and effectively communicating with prisoners and parolees with disabilities at all parole proceedings.

13. A draft of the policies and procedures required by the preceding paragraph shall be submitted to Plaintiffs' counsel within sixty days of the date of this injunction. Plaintiffs shall thereafter have thirty days to submit written comments on the policies and procedures, and the parties shall negotiate in good faith to resolve any differences. If any disputes remain, Plaintiffs shall file a regularly noticed motion regarding the

disputed issues within 150 days of the date of this injunction. The briefing of any such motion shall be consolidated with the briefing of any motions filed pursuant to paragraphs 21 and 23.

D. Training

14. Within 120 days of the date of this injunction, all BPT Commissioners, BPT Deputy Commissioners, BPT executive officers, BPT ADA coordinators, BPT appeals analysts, CDC District Hearing Agents, CDC correctional counselors and other BPT and CDC personnel who have direct or supervisory responsibility for communicating with or making decisions affecting prisoners and parolees in connection with parole proceedings shall receive adequate training in the general requirements of Title II of the ADA, disability awareness, the appropriate method of determining whether a prisoner with a disability adequately understands written and verbal communications, the circumstances that gave rise to this injunction, its requirements and the BPT's policies and procedures developed pursuant to this injunction that are relevant to the individual's responsibilities.

E. Identification and Accommodation

15. The BPT shall create and maintain a system for tracking prisoners and parolees that the BPT identifies as having disabilities. However, to the extent that tracking is conducted by the CDC, it is not necessary for the BPT to duplicate that system, and the BPT may make use of the CDC's tracking system as a permissible means of complying with the injunction.

16. Prior to meeting with a prisoner or parolee about a screening offer, and prior to parole revocation, parole revocation extension, life prisoner parole date rescission, life prisoner parole consideration, serious offender, mentally disordered prisoner or sexually violent predator probable cause

hearings, the BPT shall take reasonable steps to identify prisoners and parolees with disabilities. Such steps shall include, but not be limited to:

a. Checking the system described in paragraph 15 to determine whether the BPT has previously identified the prisoner or parolee as having a disability.

b. Reviewing all relevant and reasonably available information in the prisoner or parolee's central and medical files.

c. Verifying the disability when the BPT disputes the extent or existence of the disability. The prisoner or parolee shall be expected to cooperate with all verification efforts, but the BPT shall be responsible for verifying the disability.

17. The BPT shall provide accommodations to prisoners and parolees with disabilities at all parole proceedings. The prisoner or parolee's request for a particular type of accommodation shall be given primary consideration and shall be granted unless the request is unreasonable for specific, articulated reasons allowable under the ADA, or unless other effective accommodations are available.

18. The BPT shall hire at least one full-time ADA coordinator with expertise in Title II of the ADA, the identification of people with disabilities and the needs of people with disabilities, and shall ensure that this person is generally available during-normal business hours to answer questions from and provide advice to District Hearing Agents and other BPT and CDC personnel. This person shall not be given duties that are not related to ADA compliance. If the BPT determines that employing a full-time ADA coordinator is unnecessary, it may seek relief from the Court byway of a regularly noticed motion, but in no event shall it file such a motion until the newly hired ADA coordinator has been employed for at least

one year. The BPT shall bear the burden of demonstrating that other staffing methods are sufficient to ensure compliance with this injunction.

F. Forms

19. All BPT forms used by prisoners and parolees shall be revised so that they are written in simple English. Whenever prisoners or parolees with disabilities are given BPT forms that they cannot understand due to their disabilities, they shall be provided an accommodation to enable them to understand the forms to the best of their abilities.

20. All BPT forms provided to prisoners and parolees shall be readily available in alternative formats, including, but not limited to, large print, Braille and audio tape.

21. All revisions to forms required by this injunction shall be submitted to Plaintiffs' counsel within sixty days of the date of this injunction. Plaintiffs shall thereafter have thirty days to submit written comments and the parties shall negotiate in good faith to resolve any disagreements. If any disputes remain, Plaintiffs shall file a regularly noticed motion regarding the disputed issues within 150 days of the date of this injunction. The briefing of any such motion shall be consolidated with the briefing of any motions filed pursuant to paragraphs 13 and 23.

G. Equipment

22. The BPT shall ensure that appropriate equipment is available to prisoners and parolees who need such equipment to communicate effectively at parole proceedings. Such equipment shall include, but not be limited to, assistive listening devices, computer readers and magnification devices.

23. The BPT shall provide Plaintiffs' counsel with a list of the available equipment and the places it is available within sixty days of the date of this injunction. Plaintiffs shall

have thirty days to submit written comments and the parties shall negotiate in good faith to resolve any disagreements. If any disputes remain, Plaintiffs shall file a regularly noticed motion regarding the disputed issues within 150 days of the date of this injunction. The briefing of any such motion shall be consolidated with the briefing of any motions filed pursuant to paragraphs 13 and 21.

H. Screening Process

24. The screening offer, and all relevant BPT forms, police reports and other written documents, shall be effectively communicated to prisoners or parolees with disabilities at least seventy-two hours in advance of the time at which they must decide whether to exercise any of their rights, including the right to request an attorney, and to accept or reject the screening offer.

25. Prisoners and parolees with disabilities shall be provided an accommodation at the screening process when that is necessary to ensure that the prisoner or parolee understands to the best of his or her ability all of his or her rights, the nature of the charges and the consequences of waiving any rights. Before a prisoner or parolee with a disability may waive a parole hearing or the right to an attorney, the BPT must determine that the waiver is knowing and intelligent.

26. When necessary to achieve effective communication, appropriate auxiliary aids or assistance must be provided to prisoners and parolees during the screening process. Such aids and assistance shall include, but not be limited to, sign language interpreters, assistive listening devices, readers and persons trained to provide assistance to individuals with cognitive disabilities.

27. At its discretion, the BPT may appoint attorneys as an accommodation. In order to suffice as an accommodation, the attorneys must be adequately trained to provide

accommodations to persons with disabilities and must receive adequate additional time for providing those services. Attorneys appointed to represent individuals with disabilities shall be informed of their clients' disabilities. If the BPT is aware that a prisoner or parolee requires certain specific accommodations, the BPT shall either instruct an attorney appointed to represent that prisoner or parolee to provide those specific accommodations, or shall provide the prisoner or parolee with those specific accommodations by some other means.

28. In lieu of providing assistance at the screening process, the BPT may refer the prisoner or parolee for a hearing with the necessary aids or assistance, provided that, absent any additional charges, the hearing is within thirty days of the parole hold and that any term of imprisonment imposed at a hearing does not exceed a typical screening offer for a similar violation.

I. Hearings

29. At its hearings, the BPT shall make accommodations for prisoners and parolees with disabilities and provide appropriate auxiliary aids and services necessary for effective communication. Such accommodations and auxiliary aids and services shall include, but not be limited to, sign language interpreters, assistive listening devices, readers and individuals trained to provide assistance to persons with disabilities.

30. At its discretion, the BPT may appoint attorneys as an accommodation. In order to suffice as an accommodation, the attorneys must be adequately trained to provide accommodations to persons with disabilities and must receive adequate additional time for providing those services. Attorneys appointed to represent individuals with disabilities shall be informed of their clients' disabilities. If the BPT is aware that a prisoner or parolee requires certain specific accommodations, the BPT shall either instruct an attorney appointed to represent that prisoner or parolee to provide those specific

accommodations, or shall provide the prisoner or parolee with those specific accommodations by some other means.

31. Hearing impaired prisoners and parolees who need sign language interpreters shall not have their hands and arms restrained in any way during the hearing, unless a written determination is made on an individualized basis that the prisoner or parolee would pose a direct threat if unrestrained and that there are no other reasonable alternatives available to protect against the threat. The Chairman of the BPT or his delegate shall personally approve the use of restraints in each such instance prior to their use.

32. The BPT shall make accommodations for prisoners and parolees with disabilities in order to assist them in preparing for parole proceedings. For example, if a prisoner or parolee is entitled to review his or her central file prior to a parole proceeding, and if that prisoner or parolee is unable, due to a disability, adequately to review his or her central file without an accommodation, the BPT shall make such an accommodation. Where other preparation, including but not limited to participating in psychological interviews, obtaining letters of support and developing parole plans, is necessary prior to a parole proceeding, the BPT shall provide reasonable accommodations to prisoners or parolees with disabilities who require such accommodations adequately to complete such preparation.

J. Appeals

33. Prisoners and parolees with disabilities who cannot use or understand the appeal process or prepare an appeal themselves by reason of their disability shall be provided with effective assistance in preparing a BPT appeal.

K. Grievances

34. The BPT shall develop and implement a grievance procedure, separate from its current appeal procedure, for processing any complaints of denials of requests for accommodations. All grievances requesting reasonable accommodations at a scheduled hearing shall be decided before the hearing.

35. All administrative appeals alleging in substance violations of the ADA or its implementing regulations shall be treated as ADA grievances, and any successive appeal on the non-ADA merits of a decision shall not be deemed barred due to the filing of the ADA-related grievance or grievances. Except as otherwise provided in the immediately preceding paragraph, all such ADA-related appeals shall be decided within thirty days of the BPT's receipt of the appeal form.

L. Programs

36. The BPT shall provide to all Commissioners and Deputy Commissioners who participate in life prisoner parole consideration hearings a list of CDC programs in which prisoners with disabilities can meaningfully participate, either without accommodation or with appropriate and readily available accommodation. This list shall specify the types of programs available, the particular disabilities the programs can accommodate and the prisons in which they are offered. This list shall be updated every six months.

37. At life prisoner parole consideration hearings, the BPT shall not recommend that prisoners participate in programs that are unavailable to them by reason of their disabilities and shall not rely on the failure of prisoners to participate in programs not available to them by reason of their disabilities as a factor supporting denial of a parole date or a multi-year denial.

38. Nothing in this section shall require the BPT to release a prisoner on parole who is otherwise unsuitable for release under California law.

M. Monitoring

39. The parties shall attempt negotiate a plan to monitor Defendants' compliance with this injunction. If such negotiations are unsuccessful, the Court shall consider the appointment of a Special Master. Within forty-five days of the date of this injunction, the parties shall file a joint and mutually acceptable plan for monitoring this injunction or separate briefs describing each party's position on the need for a Special Master and the Court's authority to appoint one.

N. Enforcement

40. The Court shall retain jurisdiction to enforce the terms of this injunction.

41. No person who has notice of this injunction shall fail to comply with it, nor shall any person subvert the injunction by any sham, indirection or other artifice.

IT IS SO ORDERED.

Dated: FEB 11 2002

/s/ Claudia Wilken
CLAUDIA WILKEN
United States District Judge

Copies mailed to counsel
as noted on the following page

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN ARMSTRONG, JAMES AMAURIC; RICHARD PONCIANO; JACK SWENSEN; BILLY BECK; JUDY FENDT; WALTER FRATUS; GREGORY SANDOVAL; DARLENE MADISON; PETER A. RICHARDSON; STEVEN HILL; DAVID ROSE; DAVID BLESSING; ELIO CASTRO; ELMER UMBENHOWER; RAYMOND HAYES; GENE HORROCKS; KIAH MINCEY; CLIFTON FEATHERS; WILLIE JOHNSON; DAVID BADILLO; JAMES SIMMONS; FLORA ABRAMS; JOEY GOUGH; TIMOTHY WHISMAN Plaintiffs-Appellees, v. GRAY DAVIS, Governor of the State of California; ROBERT PRESLEY, Secretary of the Youth and Adult Correctional Agency; JAMES NIELSEN, Chairman of the Board of Prison Terms; CALIFORNIA BOARD OF PRISON TERMS Defendants-Appellants.	No. 00-15132 D.C. No. CV-94-02307-CW ORDER

BEFORE: REINHARDT, TASHIMA, and BERZON, Circuit Judges.

The panel has voted to deny appellants' petition for rehearing and petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote to whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and petition for rehearing en banc are denied.

California Penal Code
§ 3041. Parole release date; setting; criteria; review

(a) In the case of any prisoner sentenced pursuant to any provision of law, other than Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, the Board of Prison Terms shall meet with each inmate during the third year of incarceration for the purposes of reviewing the inmate's file, making recommendations, and documenting activities and conduct pertinent to granting or withholding post-conviction credit. One year prior to the inmate's minimum eligible parole release date a panel consisting of at least two commissioners of the Board of Prison Terms shall again meet with the inmate and shall normally set a parole release date as provided in Section 3041.5. The panel shall consist solely of commissioners or deputy commissioners from the Board of Prison Terms. The release date shall be set in a manner that will provide uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public, and that will comply with the sentencing rules that the Judicial Council may issue and any sentencing information relevant to the setting of parole release dates. The board shall establish criteria for the setting of parole release dates and in doing so shall consider the number of victims of the crime for which the prisoner was sentenced and other factors in mitigation or aggravation of the crime. At least one commissioner of the panel shall have been present at the last preceding meeting, unless it is not feasible to do so or where the last preceding meeting was the initial meeting. Any person on the hearing panel may request review of any decision regarding parole to the full board for an en banc hearing. In case of a review, a majority vote of the full Board of Prison Terms in favor of parole is required to grant parole to any prisoner.

(b) The panel or board shall set a release date unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public

safety requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed at this meeting. After the effective date of this subdivision, any decision of the parole panel finding an inmate suitable for parole shall become final within 120 days of the date of the hearing. During that period, the board may review the panel's decision. The panel's decision shall become final pursuant to this subdivision unless the board finds that the panel made an error of law, or that the panel's decision was based on an error of fact, or that new information should be presented to the board, any of which when corrected or considered by the board, any of which when corrected or considered by the board has a substantial likelihood of resulting in a substantially different decision upon a rehearing. In making this determination, the board shall consult with the commissioners who conducted the parole consideration hearing. No decision of the parole panel shall be disapproved and referred for rehearing except by a majority vote of the board following a public hearing.

(c) For the purpose of reviewing the suitability for parole of those prisoners eligible for parole under prior law at a date earlier than that calculated under Section 1170.2, the board shall appoint panels of at least two persons to meet annually with each prisoner until the time the person is released pursuant to proceedings or reaches the expiration of his or her term as calculated under Section 1170.2.

(d) Notwithstanding subdivision (a) and Section 5076.1, on an emergency basis, and only until December 31, 2003, life parole consideration hearings or life rescission hearings may be conducted by two-person panels consisting of at least one commissioner. In the event of a tie vote, the matter shall be referred to the full board for a decision. It is the intent of the Legislature in enacting this subdivision to allow the board to increase the number of hearings conducted each month to eliminate the backlog of inmates awaiting a parole consideration hearing. The board shall report monthly on the number of hearings conducted in the previous month, the number

scheduled in the current and subsequent months, the backlog of cases awaiting a hearing, and progress toward eliminating the backlog. The report shall be made public at a regularly scheduled meeting of the board and a written report shall be made available to the public and transmitted to the Legislature monthly.

(2)

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No. 01-1501

In The Supreme Court of The United States

OCTOBER TERM, 2001

GRAY DAVIS, et al., *Petitioners*,

v.

JOHN ARMSTRONG, et al., *Respondents*.

On Petition For Writ Of Certiorari To The
United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state statute that imposes a mandatory duty to grant parole under certain specified conditions creates a liberty interest entitling disabled prisoners who cannot effectively read, write, hear, or think to the assistance they need to understand and meaningfully participate in parole proceedings?

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STATEMENT OF THE CASE

California's parole statute requires that life prisoners eligible for parole must be released by the Board of Prison Terms (BPT), California's parole board, unless the prisoner's release would create an unreasonable danger to public safety. Cal. Penal Code § 3041(b). California also requires that prisoners being considered for parole be provided with certain procedural safeguards, including the right to an attorney, to be present at their hearings, to ask questions, and to submit documentary evidence. Cal. Penal Code §§ 3041.5, 3041.7. State courts in California have long found that due process rights attach to parole consideration hearings. *See In re Sturm*, 521 P.2d 97, 102 (Cal. 1974); *In re Clutchette,* 114 Cal. Rptr. 509, 511-12 (Cal. Ct. App. 1974).

Plaintiffs are California prisoners and parolees who are deaf, blind, mobility impaired, developmentally disabled (*e.g.*, mentally retarded) and learning disabled. App. 7a. They sued officials in charge of the California Department of Corrections (CDC) and the BPT because these public entities deprived them and other members of the plaintiff class of access to services and programs available to non-disabled people in violation of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132, Section 504 of the Rehabilitation Act of 1973 (§504), 29 U.S.C. § 794, and the Due Process Clause of the U.S. Constitution. App. 7a. Plaintiffs contended, among other things, that they were effectively deprived of their due process rights because they were not provided with the assistance they needed (such as sign language interpreters, trained assistants, readers, Braille and large print materials) that would allow them to meaningfully participate in their parole hearings. App. 8a.

The case against the BPT was tried to the court for ten days in the spring of 1999.[1] App. 61a. The district court found that defendants had engaged in a systematic failure to conduct parole procedures in a lawful manner. App. 62a-64a. The court found that the unlawful conduct was widespread, frequent, and "not subtle." App. 63a. For example,

> [s]ome prisoners who use wheelchairs have had to crawl up stairs to get to their hearings; mentally retarded prisoners who cannot even spell their names have waived their rights to a hearing and spent years in prison without the benefit of any assistance; a blind witness was denied access to information at his hearings because he could not see the documents; and hearing impaired prisoners who normally express themselves by using sign language had their hands shackled at their hearings, making such communication impossible.

App. 63a-64a. The court held that the defendants displayed a "shocking. . . level of indifference" to the plaintiffs' basic rights and had "no confidence that the BPT Defendants can cure or even recognize the statutory and constitutional deficiencies" that were found. App. 64a.

The court specifically concluded that defendants violated plaintiffs' due process rights because plaintiffs "received deficient notice, unknowingly waived important rights and [have] been subject to fundamentally unfair procedures from the moment of initial notice until the conclusion of appeal." App. 144a. For example, mentally

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[1]The CDC portion of the case settled and is not relevant to the present petition. App. 10a.

retarded class members were given no assistance comprehending their parole hearings; without such assistance it was impossible for them to participate meaningfully. App. 98a. A deaf and mentally retarded prisoner could not understand or participate in his parole hearing because he was not given the assistance he needed to communicate. App. 22a at n.20. A blind prisoner was required to make his case for parole without being given written materials in Braille, large print, or audio tapes, and without a reader. App. 112a; *see also* App. 95a-96a.

Considering the evidence in its entirety, the court concluded that defendants had denied plaintiff class members "their fundamental right to be heard in a meaningful manner." App. 145a (citation omitted). Because defendants remained in "utter denial of the scope of the violations of Plaintiff class members' statutory and constitutional rights" even after being presented with overwhelming evidence of their misconduct at trial, the district court concluded that injunctive relief was warranted. App. 149a.

Thus, faced with defendants' massive failure to honor their statutory and constitutional obligations, the court issued a Permanent Injunction and directed that Judgment be entered in favor of plaintiffs. App. 145a-150a. Among its legal conclusions, the district court ruled that California's parole statute was sufficiently determinate to confer a liberty interest on plaintiffs. App. 143a. Thus, defendants' failure to provide plaintiffs with the assistance they needed to be able to understand and participate in their hearings violated their federal due process rights. App. 144a-145a.

On appeal, defendants did not contest the district court's factual findings of widespread and systematic statutory and constitutional violations. App. 6a. They did

contest certain holdings of the district court, including the court's holding that the plaintiff class had the right to due process at parole suitability hearings. App. 25a. The Ninth Circuit affirmed the district court's holding that the parole statute was sufficiently determinate to confer a liberty interest. *Id.* Thus, defendants' failure to "enable [plaintiff class members] to attend or comprehend parole and parole revocation hearings" violated their due process rights. *Id.*

ARGUMENT

I. INTRODUCTION

Defendants argue that *Sandin v. Conner,* 515 U.S. 472 (1995), has caused a split among the Courts of Appeal over the standard to apply in determining whether state parole statutes give rise to liberty interests for life prisoners seeking parole. They cite five Circuit cases to demonstrate this split. Defendants are incorrect: there is no Circuit split and no confusion in the lower courts.

Sandin addressed the question of when a change in conditions of confinement gives rise to a constitutionally protected liberty interest. It explicitly did not overrule *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex,* 442 U.S. 1 (1979), which addressed the very question posed here: whether a state parole statute created a liberty interest. *Sandin,* 515 U.S. at 483 n.5. Since the two cases address such different subjects - the duration of confinement versus conditions of confinement - the reasoning of *Sandin* cannot be applied in parole cases. Accordingly, all the Courts of Appeal to examine liberty interests in state parole schemes since *Sandin* have continued to follow this Court's reasoning in *Greenholtz,* and the Ninth Circuit's decision in the present case unremarkably falls in line with these other cases.

The only other Circuit cases cited by defendants are inapposite. They address due process rights of prisoners being transferred from work furlough or halfway house type programs back to prison, a change of conditions of confinement that falls squarely within the holding of *Sandin.* None of these cases purports to apply *Greenholtz* or even mentions the case, since they address situations

fundamentally different from parole consideration.

Thus, there is no split of authority among the Circuits. The lower courts properly continue to follow *Greenholtz* in parole consideration cases and to follow *Sandin* in cases involving conditions of confinement. The Court should therefore deny the petition for certiorari.

II. CERTIORARI SHOULD BE DENIED BECAUSE THERE IS NO CIRCUIT SPLIT OVER THE PROPER ANALYSIS TO DETERMINE WHETHER A LIBERTY INTEREST EXISTS IN A STATE'S PAROLE CONSIDERATION PROCEDURES

Defendants are wrong in asserting that *Greenholtz* and *Sandin* present opposing standards for the review of state parole statutes. *Greenholtz* directly addressed liberty interests in the parole consideration process, finding that a Nebraska state parole statute, by its mandatory language, created a liberty interest based on the expectancy of release it engendered. *Greenholtz*, 442 U.S. at 11-12. *Sandin,* however, addressed the issue of when an adverse change in conditions of confinement creates a liberty interest. *Sandin,* 515 U.S. at 487. *Greenholtz* analyzed a parole statute that governed the duration of confinement, while *Sandin* looked to prison conditions to determine whether an adverse change was of sufficient magnitude to trigger due process protections.

Sandin instructs lower courts to look to the nature of the confinement that the state sought to impose through the challenged procedure. *Sandin,* 515 U.S. at 483-84. If the confinement poses an "atypical and significant hardship in relation to the ordinary incidents of prison life," a liberty

interest is created and the prisoner is entitled to due process. *Id.* Thus, *Sandin* looked at the nature of the confinement in disciplinary segregation, not the language of the disciplinary regulations, to determine whether the prisoner had a liberty interest in the disciplinary proceedings.

Parole cases, however, always directly involve the prisoner's sentence and potential liberty. That is why, unlike *Sandin, Greenholtz* looked to the language of the parole statute, which is part of the prisoner's sentence. It is that statute which determines whether prisoners have a state created right to be released under specified circumstances. Sandin itself acknowledged that its holding was premised on conditions rather than duration of confinement, characterizing the state rule under review as "a prison regulation primarily designed to guide correctional officials in the administration of a prison," and distinguishing its holding from those cases in which "the State's action will inevitably affect the duration of his sentence." *Sandin*, 515 U.S. at 481-82, 487.

Thus *Sandin* established guidelines for procedural due process claims brought within the unique characteristics of the prison environment. In moving away from examining the language of the regulations in order to determine whether they invoke a liberty interest, the Court cited two policy considerations that are prison specific. First, prison officials must be able to promulgate regulations using mandatory language to guide discretion of prison staff to ensure uniformity, without fear of conferring liberty interests and the attendant right to a hearing. *Sandin*, 515 U.S. at 482. That concern is not present in California since by statute the prisoner has a right to a hearing with substantial procedural protections. Cal. Penal Code § 3041.5. Second,

Sandin considered the need for prison officials to manage the day-to-day affairs of their "volatile environment[s]" without undue interference from federal courts. *Sandin*, 515 U.S. at 482. Parole, by nature, does not involve the micro-management of prison facilities. Moreover, *Sandin* set a threshold that avoided such interference for prison matters that were not sufficiently serious to warrant review. However, a prisoner's interest in being paroled according to the terms of his sentence always has sufficient weight to merit the protection of the due process clause. It certainly is of equal or greater magnitude than virtually any prison condition that imposes an "atypical and significant hardship."

Since *Sandin* is inapplicable to parole, lower courts have properly continued to rely on *Greenholtz*. This reasoning is articulated most thoroughly in *Ellis v. District of Columbia*, 84 F.3d 1413 (D.C. Cir. 1996). In *Ellis,* the D.C. Circuit examined the language of the District of Columbia parole statute to determine whether it conferred a liberty interest on the prisoner seeking parole, as instructed by *Greenholtz. Ellis*, 84 F. 3d at 43-46. It found that the parole statute and regulations in question accorded such "substantial discretion" to the parole board that they lacked the mandatory nature that would support a liberty interest. *Id.* at 45-46.

In the present case, the Ninth Circuit explicitly followed *Ellis. Armstrong v. Davis,* 275 F.3d 849, 864 (9th Cir. 2001). The court examined the parole statute as required by *Greenholtz* and held that it was "sufficiently determinate to require [parole] hearings as a matter of constitutional right." *Id.*; App. 25a. Defendants do not claim in their petition that the Ninth Circuit's holding was

incorrect under *Greenholtz*.[2]

The Seventh Circuit, in *Heidelberg v. Illinois Prisoner Review Board*, 163 F.3d 1025, 1026 (7th Cir. 1998), *cert. denied*, 528 U.S. 955 (1999), also examined the language of the Illinois parole statute as required by *Greenholtz* to determine whether it was sufficiently mandatory in nature to confer a liberty interest in parole. The court did not find a liberty interest, holding that it was bound by the Illinois Supreme Court's determination that the statute conferred complete discretion on the parole board to grant or deny parole. *Id.* at 1026-27.

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[2]Furthermore, any analysis by this Court of the liberty interests in California's parole process is particularly inappropriate at this time: the California Supreme Court has recently accepted review of a case in which a lower court found that the California parole statute creates a federal liberty interest. *In re Rosenkrantz*, 116 Cal. Rptr. 2d 69, 80-81 (Cal. Ct. App. 2002), *review granted*, 46 P.3d 331 (Cal. 2002). Since state court interpretations of state statutes are relevant to federal court reviews of the federal due process interests involved, any analysis at this time, without the benefit of the California Supreme Court's interpretation, is liable to be incomplete. *Greenholtz*, 442 U.S. at 12; *Heidelberg v. Illinois Prisoner Review Board*, 163 F.3d 1025, 1027 (7th Cir. 1998), *cert. denied*, 528 U.S. 955 (1999) ("[w]e... are bound to follow a state's highest court's interpretation of its own state law" regarding the level of discretion granted to the parole board by the parole statute); *Ellis*, 84 F.3d at 1420 (in considering whether a state parole statute confers liberty interests, the court "must respect [the state court's] construction of [state] law").

Thus, all the cases involving parole decisions have appropriately continued to follow *Greenholtz*.

Defendants argue that three Circuits have followed *Sandin* in the parole context. Defendants are wrong. In *Hamm v. Latessa*, 72 F.3d 947 (1st Cir. 1995), *cert. denied*, 519 U.S. 856 (1996), the First Circuit addressed a prisoner's claim that the Massachusetts parole board's interpretation of a state parole statute regarding the timing of his parole hearing denied him due process. Because the case involved only the state law question of when the plaintiff's hearing should be held, it has no relevance to the present case. The First Circuit properly deferred to a state court holding that the parole board's interpretation of the state statute was correct. *Id.* at 955. Federal due process rights were not implicated because the case involved only a straightforward interpretation of state law.

In *Orellana v. Kyle*, 65 F.3d 29 (5th Cir. 1995), *cert. denied*, 516 U.S. 1059 (1996), the Fifth Circuit considered whether Texas's parole statutes conferred a liberty interest. The court held that the statutes had already been determined by other Fifth Circuit panels not to confer a liberty interest. *Orellana*, 65 F.3d at 32 (citations omitted). Those prior decisions relied on *Greenholtz* in their analysis of the state parole statutes. *See Creel v. Keene*, 928 F.2d 707, 712 (5th Cir.), *cert. denied,* 501 U.S. 1210 (1991); *Gilbertson v. Texas Bd. of Pardons & Paroles,* 993 F.2d 74, 75 (5th Cir. 1993). The *Orellana* court considered itself bound by those determinations and did no independent analysis of the statute. Consistent with *Ellis, Armstrong,* and *Heidelberg,* however, the court did note that *Sandin* was not determinative in the parole context. *Orellana,* 65 F.3d at 32 ("Orellana's claims might have implicated the narrow

range of prisoner liberty interests remaining after *Sandin* because he challenges procedures relative to parole, which affects the duration of confinement").

The only other cases defendants cite are not parole cases at all: they involve the question of when prisoners have liberty interests in halfway house or work furlough type programs. *See Dominique v. Weld,* 73 F.3d 1156 (1st Cir. 1996); *Asquith v. Department of Corrections,* 186 F.3d 407 (3d Cir. 1999); *Callender v. Sioux City Residential Treatment Facility,* 88 F.3d 666 (8th Cir. 1996). Prisoners in such programs remain technically incarcerated but are granted limited access to the outside world. Because these cases involved conditions and not the duration of confinement, the Circuit courts employed a *Sandin* analysis to determine when a liberty interest was created. Not one of the courts even mentioned *Greenholtz.* Such conditions of confinement cases are irrelevant to a discussion of parole consideration cases, to which the reasoning of *Sandin* does not apply.

CONCLUSION

All Courts of Appeal that have examined state parole statutes to determine whether they confer liberty interests following *Sandin* have, like the Ninth Circuit in *Armstrong,* continued to rely on *Greenholtz.* The opinion below is consistent with the applicable holdings of this Court and with the opinions of the other Circuits that have addressed this issue. The petition for writ of certiorari should be denied.

Dated: July 24, 2002.

Respectfully submitted,

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No. 01-1501

In The Supreme Court of The United States
OCTOBER TERM, 2001

GRAY DAVIS, et al., *Petitioners*,

v.

JOHN ARMSTRONG, et al., *Respondents.*

On Petition For Writ Of Certiorari To The
United States Court Of Appeals For The Ninth Circuit

CERTIFICATE OF SERVICE BY MAIL

Donald Specter, a member of the Bar of the Supreme Court of the United States, states:

that his business address is General Delivery, San Quentin, CA; that on July 24, 2002, he served three copies of the OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI in the above-entitled matter on the petitioners by placing same in an envelope addressed as follows:

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Said envelope was then sealed and deposited in the United States Mail at San Rafael, California, with the postage thereon fully prepaid.

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(3)

Supreme Court, U.S.
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No. 01-1501

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2001

GRAY DAVIS, et al., *Petitioners,*

v.

JOHN ARMSTRONG, et al., *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

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IN THE SUPREME COURT OF THE UNITED STATES

No. 01-1501

GRAY DAVIS, et al., *Petitioners,*

v.

JOHN ARMSTRONG, et al., *Respondents.*

PETITIONER'S REPLY BRIEF

Petitioners seek a writ of certiorari to resolve the circuit conflict regarding the proper test for determining the existence of state-created liberty interests in state parole proceedings. The test set forth in *Sandin v. Conner*, 515 U.S. 472 (1995), looks to the nature of the interest while the test used in *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979), parses state statutes and regulations searching for "mandatory language" and "substantive predicates." Respondents claim there is no circuit split on this issue of national importance, because the cases that apply the *Sandin* test involve conditions of confinement while those that apply the pre-*Sandin* methodology of *Greenholtz* involve the length of confinement. Other than confusion in the circuits as to what test to follow, there is no distinction between the types of cases.

State custody is a continuum of conditions ranging from administrative segregation on the one end to supervised release on the other. There is no rational reason to change the method for determining state-created liberty interests as the nature of the custody changes. Whether a prisoner has a liberty interest at all

may be affected by his or her place on the continuum, but the test for determining whether it exists should not be.

Respondents attempt to explain away the circuit split over which test to apply by contending that the conditional-release cases that applied the *Sandin* test were conditions-of-confinement cases and have no bearing on this case, which they characterize as a length-of-confinement case. Opp. at 11; *see, e.g., Dominique v. Weld*, 73 F.3d 1156 (1st Cir. 1996); *Asquinth v. Department of Corrections*, 186 F.3d 407 (3d Cir. 1999); *Callender v. Sioux City Residential Treatment Facility*, 88 F.3d 666 (8th Cir. 1996). Under Respondents' proposed distinction, prisoners at both ends of the continuum–those whose privileges are restricted by administrative segregation as in *Sandin* and those already enjoying the freedoms of conditional-release programs–would be subject to the *Sandin* test. Implausibly, prisoners in the middle–those like the prisoners here who are serving life terms and can only hope to be paroled–would be subject to the *Greenholtz* test. Such a scheme would compound the confusion that currently exists among the circuits, and also risks interfering with the States' ability to predict the effect of their regulations regarding length and conditions of confinement.

Respondents characterize this case as one involving the length of confinement rather than the conditions of confinement. But it is important to remember that the prisoners here are serving term-to-life sentences. The inmates' sentences cannot be shortened by, for instance, restoring lost sentence credits. The issue here–whether a prisoner has a state-created liberty interest in receiving certain procedures at a parole-consideration hearing–does not inevitably affect the length of his or her sentence. If a prisoner received an unfair parole-consideration hearing it does not follow that the prisoner would automatically be entitled to release if he or she received a fair hearing.

Moreover, a denial of parole merely means that the inmate must serve the life sentence originally imposed. This Court has recognized that *Sandin* applies to clemency proceedings, which share many of the same discretionary aspects as parole for life prisoners, and that a "denial of clemency merely means that the inmate must serve the sentence originally imposed." *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 283 (1998). Here, because the length of confinement is for life, everything that relates to the period of confinement becomes a condition of it. The two concepts are inseparable. And regardless of how the argument is cast–conditions or length of confinement–the test for determining whether a liberty interest exist must be the same.

Again attempting to explain away the circuit split, Respondents characterize a case that recognized the *Sandin* test as appropriate for parole cases, *Hamm v. Latessa*, 72 F.3d 947 (1st Cir. 1995), as irrelevant because it only involved the state-law question of when a parole hearing should be held. Opp. at 10. On the contrary, the *Hamm* court framed the question before it as follows: "[T]o determine whether the respondent's application of its parole scheme, deemed lawful by the state's courts, violated the Due Process Clause." *Hamm*, 72 F.3d at 955. The *Hamm* court recognized that after *Sandin* "the tectonic plates [had] shifted"; no longer would courts comb state statutes searching for the presence or absence of mandatory language, but instead they would focus on the nature of the liberty at stake. *Id.* at 954. The *Hamm* court then deferred to the state court's previous interpretation of its parole statutes as conferring no right to the parole hearing at issue and found that federal due process was satisfied. *Id.* at 955-56.

Similarly, the Respondents argue that *Orellana v. Kyle*, 65 F.3d 29 (5th Cir. 1995), does not implicate a circuit split. Opp. at 10. But indeed it does. As in *Hamm*, the *Orellana* court recognized the *Sandin* test applied to parole proceedings, but because the state courts had previously held that the parole statutes conferred no liberty interests, the inmate could not

"complain of the constitutionality of procedural devices attendant to parole decisions." *Orellana*, 65 F.3d at 32.

In sum, the circuits are split on this issue of national importance, and this Court should grant the petition to resolve the split and to provide guidance to the lower courts.

Dated: August 23, 2002

Respectfully submitted,

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